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January 7,1935.

SUBJECT: Licensing the Operation of Vehicles
Offered to the Public for Hire.

Gentlemen:

This office is in receipt of your request for an opinion, as follows:

REQUEST

Has the City and County of San Francisco the power to license and regulate the operation of vehicles offered to the public for hire?

OPINION

I am informed that the ordinance licensing the operation of vehicles offered to the public for hire is now pending before you. In this ordinance there are fixed various license taxes for such vehicles.

Section 145 of the California Motor Vehicle Act provides in part as follows:

> "Nothing in this act contained shall be so construed as to prevent boards of supervisors* * * from licensing and regulating the operation of vehicles offered to the public for hire,* * *."

At first blush it might appear as though this section of the California Motor Vehicle Act gives the City and County of San Francisco authority to levy a license tax upon the operation of vehicles offered to the public for hire, but the section does not do this. All that it does is to provide that nothing in the act shall prevent the board of supervisors from licensing and regulating the operation of vehicles offered to the public for hire.

We now come to the proposition of whether the City and County of San Francisco has any power to license the operation of vehicles under such conditions.

In the case of EQUI v. CITY AND COUNTY OF SAN FRANCISCO, Superior Court No.240,511, which decision has become final, Judge Walter Perry Johnson, in a very long and elaborate opinion fortified by many authorities, held that the City and County of San Francisco could not levy a license tax for revenue, but could only levy license taxes for regulatory purposes.

Under these conditions we are met with the proposition that the City and County of San Francisco can levy a license tax upon the operation of vehicles offered to the public for hire only if the license tax is based upon regulation and not upon revenue.

January 7, 1938.

SUBJECT: Licensing the Operation of Vehicles Offered to the Public for Hire.

Gentlemen:

This office is in receipt of your request for an opinion, as follows:

REQUEST

Has the City and County of San Francisco the power to license and regulate the operation of vehicles offered to the public for hire?

OPINION

I am informed that the ordinance licensing the operation of vehicles offered to the public for hire is now pending before you. In this ordinance there are fixed various license fees for such vehicles.

Section 148 of the California Motor Vehicle Act provides in part as follows:

> "Nothing in this act contained shall be so construed as to prevent boards of supervisors from licensing and regulating the operation of vehicles offered to the public for hire, " " ".

At first blush it might appear as though this section of the California Motor Vehicle Act gives the City and County of San Francisco authority to levy a license tax upon the operation of vehicles offered to the public for hire, but the section does not do this. All that it does is to provide that nothing in the act shall prevent the board of supervisors from licensing and regulating the operation of vehicles offered to the public for hire.

We now come to the proposition of whether the City and County of San Francisco has any power to license the operation of vehicles under such conditions.

In the case of EQUI v. CITY AND COUNTY OF SAN FRANCISCO, Superior Court No. 240,311, which decision has become final, Judge Walter Perry Johnson, in a very long and elaborate opinion fortified by many authorities, held that the City and County of San Francisco could not levy a license tax for revenue, but could only levy license taxes for regulatory purposes.

Under these conditions we are met with the proposition that the City and County of San Francisco can levy a license tax upon the operation of vehicles offered to the public for hire only if the license tax is based upon regulation and not upon revenue.

It is therefore my opinion that the City and County of San Francisco has no power to levy a license tax upon the operation of vehicles offered to the public for hire for the purpose of obtaining revenue, but can do so only for the purpose of regulating such vehicles.

If you find a reasonable basis for sustaining a regulatory license tax upon such vehicles, I am convinced that the ordinance is valid. If you cannot do so and you pass the ordinance merely for the purpose of raising revenue, the ordinance is invalid.

Respectfully,

City Attorney

BOARD OF SUPERVISORS,

#3

It is therefore my opinion that the City and County of San Francisco has no power to levy a license tax upon the operation of vehicles offered to the public for hire for the purpose of obtaining revenue, but can do so only for the purpose of regulating such vehicles.

If you find a reasonable basis for sustaining a regulatory license tax upon such vehicles, I am convinced that the ordinance is valid. If you cannot do so and you pass the ordinance merely for the purpose of raising revenue, the ordinance is invalid.

Respectfully,

City Attorney

BOARD OF SUPERVISORS.

January 12, 1935.

SUBJECT: Re: Regulating Closing Hours of Laundries.

Gentlemen:

You have heretofore submitted to me an ordinance regulating the maintenance of public laundries and public wash houses within the City and County of San Francisco and providing for the closing thereof on Sundays and legal holidays, and in addition said ordinance provides for identification of all vehicles used in said business.

OPINION

Such an ordinance to be legal must be based upon the necessity of inspection as a health precaution and must also be based upon the fact that there are inspectors for such public laundries and public wash houses and that such inspection cannot be made on Sundays or legal holidays because of the fact of the absence from duty of such inspectors.

The questions of fact for the Board of Supervisors to determine are whether or not there are such inspectors, whether or not such inspection could be made on Sundays and legal holidays, and if such inspection is necessary for the protection of the health and welfare of the citizens of the City and County of San Francisco.

If you reasonably determine that such inspection is necessary for the public health, and if it is a fact that there are inspectors for such purpose and that such inspectors are not on duty on Sundays and holidays, it is my opinion that such an ordinance would be legal.

IN RE LOWENTHAL, 92 Cal. 200;
EX PARTE HENNESSY (Cal.), 273 Pac. 826.

Such a provision as is contained in Section 3 of said ordinance, providing for the lettering or painting the name of the laundry upon vehicles engaged in collecting or delivering clothes, has been upheld in the case of milk wagons under the State Milk Act and I can see no reason why the same argument would not apply to laundry wagons, and, therefore, it is my opinion that such requirement is legal.

Respectfully,

CITY ATTORNEY

BOARD OF SUPERVISORS,
City Hall.

January 18, 1935.

SUBJECT: Payment of Taxes for Current Year Without Payment for Previous Years.

Dear Sir:

This office is in receipt of your request for an opinion as follows:

REQUEST

"On May 15, 1933 the Governor approved Senate Bill No. 178 known as Chapter 340, Statutes 1933, wherein it was required that the owner of a motor vehicle pay his 1934 tax and have his motor vehicle registration certificate validated by the assessor in order that he might procure his 1935 license plates which are only procurable without penalty during the month of January.

"Your opinion is requested by us as to whether we may legally refuse to accept the 1934 tax, now being paid to us plus 10% penalty on those who failed to file, because of the fact that the Bureau of Delinquent Revenue in charge of Mr. Richardson has on its delinquent rolls a tax due for a previous year."

OPINION.

There appears to be no California Statute which requires the Assessor to refuse to accept the 1934 personal property taxes when payment of personal property taxes for previous years has not been made. Under these circumstances the general rule applies.

See: 61 COR. JUR. 966.

This rule is to the effect that a tax payer may pay taxes for any year that he may desire irrespective of whether he has paid for previous years.

Therefore, you may not legally refuse to accept the 1934 personal property taxes when tendered under the circumstances outlined in the request.

To -
The Assessor.

Respectfully submitted,

CITY ATTORNEY

#3

Feb. 19, 1935.

SUBJECT: Is Majority of Quorum of Members of Board of Education Sufficient to Determine Matters Pending Before said Board?

Gentlemen:

This office is in receipt of your request for an opinion as follows:

REQUEST

"The Board of Education desires to be advised concerning whether a majority of a quorum of its members can determine matters pending before the Board.

"In 1910 a rule of the Board of Education was passed by the Board members as follows: 'The concurrent vote of a majority of its members shall be necessary to transact business.'

"We desire to be advised further whether this rule has any application to the question."

OPINION.

The 1932 Charter of the City and County of San Francisco provides for the nomination of members of the Board of Education by the Mayor, subject to confirmation or rejection by the electors. (Sec. 134). Nowhere in the 1932 Charter is there any direct reference to a method of determining the number constituting a majority when a vote is taken by the Board.

It has been suggested that subdivision (i) of Section 19 of the 1932 Charter is applicable. The pertinent portion of subdivision (i) of Section 19 reads as follows:

"A quorum for the transaction of official business shall consist of a majority of all the members of each board or commission, but a smaller number may adjourn from time to time and compel the attendance of absent members in the manner and subject to penalties to be provided by ordinance. A majority, two-thirds, three-fourths, or other vote specified by this charter for any board or

commission shall mean a majority, two-thirds, three-fourths or other vote of all the members of such board or commission."

However, it does not appear that the foregoing quotation, in its entirety, is applicable to the Board of Education. Only the first sentence seems to apply. This sentence refers to the method of determining a quorum. The second sentence very definitely provides that when a fixed proportion is specified by the Charter, such fixed proportion includes all of the members of the board or commission involved. But since there is no fixed proportion of members of the Board of Education provided anywhere in the Charter, we are of necessity relegated to the common law rule which is very aptly set forth in 43 Cor. Jur. 506, as follows:

"While in the absence of charter or statutory provision to the contrary the rule is well established that a majority of a quorum is all that is required for the adoption or passage of any ordinance, resolution, or order properly arising for the action of a municipal council or other municipal body, " " " ."

See also:

IN RE BINGHAMTON, 89 N.Y.S. 893;
HAUSMAN v. EARLE, 120 Atl. 738 (N.J.);
THURSTON v. HUNTON, 98 N.W. 637 (Iowa).

Reference has been made by members of the Board of Education to the opinion rendered by me on June 26, 1931, in which I held as follows:

"Section 3, Chapter I, Article VII of the Charter provides that no action or decision of the Board of Education shall become official and binding without the concurrence of a majority of the members of the Board."

You will note that the Charter reference in the foregoing quotation is to the 1899 Charter and not to the 1932 Charter. In the 1899 Charter, Section 3, Chapter I, Article VII, it is provided as follows:

"****and no action or decision of the board shall become official and binding without the concurrence of a majority of the members of the board."

Under the circumstances it very clearly appears that under the 1899 Charter it was necessary for the Board, in acting

upon or deciding a matter, to have a majority of all of the members of the Board concur. In view of the fact that the 1932 Charter contains no similar language, it is reasonable to assume that the Board of Freeholders desired to make a change from the rule requiring concurrence on the part of a majority of all of the members of the Board of Education to that of a majority of a quorum.

My attention has been directed to the claimed unrepealed rule mentioned in the request, which rule was passed by the Board of Education in 1910 at a time when there were but four members of the Board. This Board was created by an early Charter provision. Unquestionably, this rule is no longer applicable. At the time of its passage the Charter provided for but four members of the Board of Education, and these four members obtained office under an entirely different system than that subsequently established when seven persons constituted the Board of Education.

This reasoning must, of necessity, be sound since the later Charter provision provided for action by a majority of the whole Board in order to give effect to its action. The later Charter provision was, in effect, a repeal of the 1910 Board rule. When the 1932 Charter became effective, the later rule of the 1899 Charter passed out of existence. The effect of this was certainly not to re-enact the dead rule of 1910.

Incidentally, any proceedings had by the present Board of a parliamentary nature would subordinate a rule previously adopted so long as a majority of a quorum prevailed. (See 43 Cor.Jur. 504.) This seems to be the general rule.

Subdivision (a) of Section 19 of the 1932 Charter gives the Board of Education the power to prescribe reasonable rules and regulations not inconsistent with the Charter for the conduct of its affairs. In the absence of a contrary statute, I seriously question the reasonableness of any rule which would compel more than a majority of a quorum to act, in order to have such action declared valid.

In view of the foregoing, I am of the opinion that the Board of Education of the City and County of San Francisco may lawfully act by vote of a majority of a quorum.

Respectfully submitted,

CITY ATTORNEY.

To the -
Board of Education.

March 2, 1935.

SUBJECT: In re, Assessment of Personal Property escaping Taxation between the first Monday of March and the first Monday of July.

Dear Sir:

I have your letter reading as follows:

"Your attention is directed to Section 3649 of the Political Code of the State of California (as amended in 1933 - said amendment becoming effective August 21, 1933.)

"Your attention is particularly directed to that portion of the sentence in the first paragraph which reads, 'such property when discovered by the Assessor to have escaped taxation for such year - - shall be assessed and entry thereof immediately made upon the Assessment Roll.' Recognizing that the above quoted sentence must be read in connection with the complete section the following question is submitted to you for opinion:

Question

"In the event of the discovery by the Assessor sometime after the first Monday of March 1935 that a motor vehicle escaped taxation in 1934, should the entry of such escape be made on the Assessment Roll of the year for which said property should have been assessed or is the Assessor permitted to include in the 1935 Assessment Roll, the 1934 escape?"

OPINION

You will note that Section 3649 of the Political Code, a portion of which you quote in your letter, is in two paragraphs and, as you say, every part of the section must be construed so as to give effect to all of its provisions, if this is possible. It is not entirely clear from the first part of the section whether the entry of the assessment should be made in the tax rolls of the current year or in the rolls of the year during which the lien attached to the property.

However, on examining the second paragraph of the section I find the following language:

> "The authority granted to the assessor to assess property which has escaped taxation and to enter the same upon the assessment or tax roll of the year for which said property should have been assessed or taxed shall be limited to a period not more than two years from the date upon which the lien for taxes of such year attached."

It would appear to me from the above quoted language that it was the intention of the Legislature that the entry of the assessment should be made in the rolls of the year during which the property in question escaped taxation. This conclusion is borne out when you examine Section 3649 as it was originally enacted and as it existed up to the time of the 1933 amendment.

As it then read, the Assessor had the power to assess property which had escaped taxation during the previous year at double its value. Under the amended section, it appears that the only penalty which the Assessor can visit upon property which has escaped assessment is to add ten percent of the tax if the property is discovered after the first day of December of the year for which it is taxable.

You are therefore advised that, in our opinion, the entry of the assessment should be made in the records of the year for which the property escaped taxation.

Respectfully submitted,

_____

To the Assessor.

#1

March 6, 1935.

SUBJECT: Charge for Installation of Temporary Roof on Lowell High School after Fire.

Gentlemen:

This office is in receipt of your request for an opinion as follows:

"We would like to have your opinion as to the responsibility for the payment of temporary repairs necessitated by fire at Lowell High School, as to whether they are a proper charge upon the City and County of San Francisco and/or the Board of Education.

"Under the terms of Mr. Petersen's contract, was it his duty to protect the building after the fire, and should the cost of such protection be assumed by Mr. Petersen?

"We have an estimate of $1,950.00 for installing temporary roof, for work done after the fire to protect further damage being done by rain, etc. The contracts in question are in the hands of the Director of the Department of Public Works."

OPINION

In rendering an opinion in this matter it must be borne in mind that the Lowell High School was damaged by fire at a time when certain repair work was being done on it by a contractor. The contractor's specifications, among other conditions, provide as follows:

"Responsibility of Contractor

"The Contractor shall be responsible for any damage to the building, its contents, or to any portion of the property, including steps, sidewalks, pavements, curbs, planting, etc., and he shall repair all such damage at his own expense in a manner satisfactory to the Department of Public Works and the Engineer.

"The above mentioned damage shall include fire. The Contractor shall protect the City and County of San

Francisco against all loss by taking out the necessary fire insurance in excess of that mentioned in the General Conditions, for he will be held solely responsible if the building, or any portion of it, or its contents, is damaged by fire during the life of his contract. Such insurance shall be taken out in the manner specified in the General Conditions.

"The Contractor shall also be responsible for any damage to the building, or to its contents, as a result of rain entering the building during the life of his contract. He shall provide planking, building paper, tarpulins, or other means, sufficient to give complete protection against the elements."

In order to reach a proper determination of the question of whether the School District should bear the cost of installing a temporary roof or whether the contractor should bear this charge, it is necessary to analyze the foregoing quoted provisions of the specifications.

You will note that the first paragraph of the quoted portion of the specifications provides as follows:

"The Contractor shall be responsible for any damage to the building, its contents, or to any portion of the property, including steps, sidewalks, pavements, curbs, planting, etc., and he shall repair all such damage at his own expense in a manner satisfactory to the Department of Public Works and the Engineer."

This paragraph was undoubedly meant to apply in the event any damage was done by the contractor himself during the course of the repair work. I am informed that the contractor was not in any wise responsible for the fire. Consequently, this paragraph would not place any liability upon him notwithstanding the fact that in the next paragraph we find the following:

"The above mentioned damage shall include fire."

In the second quoted paragraph it is indicated that the intention of the contracting parties was that the contractor should procure fire insurance policies executed for the protection of the City and County of San Francisco in the event of fire during the life of the contract. I am informed that this was done and any and all loss resulting from the fire was paid by the insurance carriers.

The third quoted paragraph is the paragraph with which

[illegible]

[illegible]

[illegible]

we are directly concerned. It provides as follows:

> "The Contractor shall also be responsible for any damage to the building, or to its contents, as a result of rain entering the building during the life of his contract. He shall provide planking, building paper, tarpaulins, or other means, sufficient togive complete protection against the elements."

You will note that this paragraph provides for responsibility on the part of the contractor for any damage to the building or its contents as a result of rain entering the building during the life of the contract. The paragraph further provides that the building shall be completely protected against the elements. It is reasonably evident that this paragraph was meant to cover a situation contemplated by the contracting parties, to-wit, protection against the elements when it became necessary for the contractor to make repairs which would normally, and during the course of his work, permit rain to enter the building. It is hardly likely that it was intended to cover a situation where the roof of the building was partially destroyed by fire.

There is some question about this fact. The paragraph is possibly susceptible of two constructions, but when the entire portion of the specifications dealing with the responsibility of the contractor are read it becomes fairly reasonably evident that the contractor should be responsible for rain getting into the building only under the usual and ordinary conditions, and not as a result of an extraordinary situation such as a fire.

In view of the foregoing I am of the opinion that the cost of the installation of a temporary roof should be borne by the School District.

Respectfully submitted,

_____

CITY ATTORNEY.

To -
The Board of Education.

#3

March 6, 1935.

SUBJECT: Contract for Repair of Existing Building Abrogated by Partial Destruction of Building.

Gentlemen:

This office is in receipt of your request for an opinion, as follows:

REQUEST

"RESOLVED: That it be and is hereby declared to be the complete sense of the Board of Education that the contract for Lowell High School be completed by the contractor, Mr. H. L. Petersen, provided that said contract is not cancelled as a matter of law.

"The Board at its meeting last night directed that a request be sent to you asking for a written opinion on the following question:

'Did the fire in Lowell High School cancel the contract with H. L. Peterson?'"

OPINION

When an existing building is being repaired and it is destroyed by fire, the following seems to be the rule:

"It is also very well established in this country that where one, as in this case, agrees to furnish labor and materials on an existing building, the property of another, the agreement is upon the implied condition that the building shall remain in existence, and that the destruction of it without the fault of either party will excuse performance of the contract by the person performing such labor, and entitle him to recover the reasonable value of the part performance already effected."

KEELING v. SCHASTEY & VOLIMER,
18 Cal. App. 764, at 766.

In view of the fact that the rule is that when an existing building is destroyed the contract is abrogated, I can perceive no reason why the same rule would not apply in the event the building were destroyed to such an extent as to preclude the possibility of a resumption of the repair work notwithstanding that the building was not entirely destroyed.

March 9, 1[illegible].

[illegible]: Contracts for Erection of Building.
Validity Challenged by Taxpayer
Refusal of Injunction.

[illegible]

This action is in nature of some taxpayers [illegible] on [illegible]:

[illegible]

"[illegible] that it be said in [illegible], believed to be the constitutional scheme of the [illegible] of contracting that the employment [illegible] should be regulated by the [illegible] Lawyer, [illegible] v. [illegible], provided that [illegible] should be [illegible] as a matter of law.

"The [illegible] of the [illegible] [illegible] [illegible] have a [illegible] to [illegible] [illegible] a [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] in [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [

In GIBBS v. HERSMAN, 73 Cal. App. 732, the court held that where from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the thing to which it relates the subsequent perishing or destruction of the thing would excuse performance.

Thus we find in effect that where there is an impossibility of performance the building contract is abrogated as a result of the destruction of the work to be repaired.

See also: 53 A. L. R. 131,
74 A. L. R. 1289,
6 CAL. JUR. 445.

All of the foregoing reasoning, of course, depends upon the lack of an expressed provision to the contrary in the specifications. We find no expressed provision making the contractor liable in this case.

I have been informed by Mr. William H. Worden, Director of the Department of Public Works that because of the extent of the destruction wrought by the fire it is impossible for Mr. Petersen to continue with the contract.

Under these circumstances, it is my opinion that the contract with Mr. Petersen was abrogated and cancelled by the fire.

Respectfully,

_____
CITY ATTORNEY

BOARD OF EDUCATION,
Civic Auditorium.

#3

March 15,1935.

SUBJECT: Assessor may Assess Whiskey and Liquors at its cost Including Federal Tax. No Double Taxation Involved.

Dear Sir:

You have requested my opinion as to your authority to assess whiskey and other liquors on the basis of their costs to the wholesaler, which cost includes the United States Government Internal Revenue Tax. Your thought in the matter concerned the possibility of a double taxation, because of the imposition of the aforesaid United States tax and the City and County tax based upon the assessment.

OPINION.

Section 3627 of the Political Code of California directs that "all taxable property must be assessed at its full cash value * * * *", and Section 3617 of the said Code, provides: "The terms 'value' and 'full cash value' mean the amount at which the property would be taken in payment of a just debt from a solvent debtor* * *".

So in view of the aforesaid provisions of law you may assess the property in question on the basis indicated because the federal tax paid enters into the "full cash value" of it.

The objection predicated upon the theory of double taxation is untenable, particularly when the definition given to such term by the said court is taken into consideration.

> "Double taxation in a legal sense does not exist unless the same property is taxed twice by the same government or within the same jurisdiction, during the same period."

24 Cal.Juris. p. 132, Section 113;
San Francisco v. Frey, 63 Cal.470;
C. A. Canfield v. County of Los Angeles, 157 Cal.617.

The taxing authority herein to be exercised is by the municipality of San Francisco, which is absolutely distinguishable from the United States government, the agency which imposed the internal revenue obligation.

[illegible]

[illegible] Lawrence and Jerome Tabelson [illegible]
[illegible] at the [illegible] Institute
[illegible] Prof. [illegible] Theodore Thomas
[illegible]

[illegible]

[illegible]

[illegible] have [illegible] to [illegible] in [illegible] [illegible] [illegible]

Therefore, the proposed procedure outlined by you is in accord with legal principles and thus permissible.

Respectfully,

City Attorney.

THE ASSESSOR.

March 18, 1935.

SUBJECT: Billboards - Carrying on the Business or Occupation of Bill Posting or Maintaining Billboards.

Gentlemen:

I have your communication wherein you ask if a person who desires to erect a single billboard on his own property, which billboard advertises another's business, is engaged in "carrying on the business or occupation of bill posting or maintaining billboards", and therefore must he pay the license provided by the ordinance before he is entitled to a permit to erect the billboard?

OPINION

The pertinent portion of the license ordinance on the subject is as follows:

> "No person, firm or corporation shall engage in or carry on the business or occupation of bill posting, advertising, sign painting or outdoor advertising or maintaining billboards without paying the license provided for in this ordinance."

The question to be determined therefore is: Does a single act bring one within the term "engaged in business"?

In MERCED COUNTY v. HELM, 102 Cal. 159, the Supreme Court of this state said:

> "A single act does not constitute a business, and when a sale is but an incident in, or the final act of, another business, it cannot be said to be the business which is carried on and transacted."

In CUZNER v. CALIFORNIA CLUB, 155 Cal. 303, the court said:

> "The term 'business' as used in a law imposing a license tax on businesses, trades, professions, and callings, ordinarily means a business in the trade or commercial sense, one carried on with a view to profit or livelihood."

The courts in other jurisdictions have expressed similar views on the subject.

See MORNING STAR v. STATE (Ala.), 33 So. 485. In this case the court said:

[illegible], 1960.

[illegible]: Utilitarian - depending on the [illegible]
or [illegible] of [illegible] rather or [illegible]
taking [illegible].

[illegible]:

I have just [illegible] [illegible] you had if a person who [illegible]
plan to erect a single [illegible] on his own property, which [illegible]
[illegible] neighbor's [illegible], is [illegible] to "[illegible]" on the [illegible]
[illegible] of [illegible] [illegible] [illegible] [illegible], and [illegible]
[illegible] that [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible]

The [illegible] [illegible] of the [illegible] [illegible] [illegible] [illegible]
[illegible] as follows:

"A person, firm or [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible], [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible]

"Doing a single act, pertaining to a particular business, will not be considered, as has been held, as engaging in or carrying on the business, yet a series of such acts would be so considered."

The Supreme Court of the same state has in the case of ROWE v. STATE, 99 So. 748, said:

"The term, 'engage in business,' within Acts 1919, as applied to labor agents, means that employment which occupies the time, attention, and labor of the person so engaged in business, and not an employment that is occasional, irregular, or illegal, and a single act, is not engaging in business, unless he makes all necessary preparation to carry on the business, and holds himself out therefor."

In view of the foregoing, you are advised that one who erects a single billboard upon his own property, although that billboard may advertise the business of another, and there is no evidence presented to you that the single act is one of similar future acts, is not engaged in the business "of bill posting, etc." Therefore, unless there is some particular inhibition against the erection of billboards at the particular locality, or that it is not constructed as required by ordinance, a permit to erect the billboard cannot be denied merely because the applicant has not paid the license.

Yours very truly,

CITY ATTORNEY

Board of Permit Appeals,
City Hall.

#1

March 18, 1935.

SUBJECT: In Re, Necessary Legislation
to Permit Contributions to
San Francisco Bay Bridge Exposition.

Dear Sirs:

Supervisor Arthur M. Brown has requested that I advise your Board what legislation, local and state, would be necessary if the State of California as well as San Francisco is to make any contribution to the San Francisco Bay Bridge Exposition Commission to aid in the holding of the exposition.

OPINION

San Francisco Bay Bridge Exposition Commission is a private non-profit corporation organized under the laws of the State of California and therefore practically the same local and state legislation will be necessary if city and state funds are to be contributed to the Exposition Commission as was necessary in 1910 in order to enable contributions to be made to the Panama Pacific International Exposition Company.

Section 22, Article IV of the State Constitution provides that no money shall ever be appropriated or drawn from the State Treasury for the purpose or for the benefit of any corporation, association, asylum or any other institution not under the exclusive management and control of the state as a state institution, nor shall any grant or donation of property ever be made thereto by the state.

Section 31 of the same Article prevents the lending of the credit of the State or of any county, city and county, or city in aid of or to any person, association or corporation.

When the Panama Pacific International Exposition Company desired to secure the aid of the State and of San Francisco for its exposition the sections of the Constitution were amended to permit both the State and the city to make contributions to the Exposition Company. San Francisco, at that time, also amended its Charter so that the electors could authorize bonds in the sum of $5,000,000.00 and give that amount to the Exposition Company for exposition purposes.

The pertinent provision on this subject is found in Section 29A of the old Charter.

Therefore, I am of the opinion that before the State can make any contribution or lend its credit to the present Exposition Commission, Section 22 of Article IV of the State Constitution will have to be amended by a bill to permit the State to do so. Section 8½ or some other appropriate section of the Constitution would have to be amended so that the electors would be authorized to amend our Charter to permit the issuance of bonds and the turning over of the amount thereof to the present Exposition Commission.

I have been advised by the attorney for the Commission that there is no intention on the part of the Commission at this time of asking for any contribution from the City and County of San Francisco either from moneys raised by taxes or from the proceeds of a bond issue; and also, that while certain bills have been introduced in the present session of the State Legislature (which said bills are, as yet, in skeleton form) looking to authority to permit the State to issue bonds and make contribution of the proceeds to the Exposition Commission for the purpose of aiding of the holding of the exposition, I understand that these measures are not to be pressed unless Los Angeles presses to passage similar bills introduced for the purpose of permitting a state grant to the proposed Los Angeles Exposition.

If the contemplated San Francisco Exposition is to be held on the Yerba Buena Shoals I am of the opinion that the Act passed in 1933 ceding these shoals to the city for the purpose of conducting an air-port will have to be amended so as to permit their use for exposition purposes. A bill providing for such an amendment has been introduced in the Assembly by Assembly-man Frazier of Butte County. As yet the bill has not been acted upon.

Respectfully submitted,

CITY ATTORNEY.

To the -
Board of Supervisors.

#1

March 26, 1935.

SUBJECT: A Teacher enceinte who dies after Delivery which occurred during Leave on account of Condition is Deemed continuously Incapacitated Physically at such Time.

Gentlemen:

My opinion is requested by you on the liability of your system for the payment of certain benefits under the terms of Bill No. 9547, Ordinance No. 9134, on the following factual structure:

A teacher in the School Department, becoming pregnant, was enforced to take a leave of absence in July, 1934, because of the rule of said Department reading thus:

> "Resolved: That a teacher who expects to become a mother must absent herself from the school-room for a period of approximately six months before the birth of the child and for at least six months after, effective July 1, 1927."

This person received medical attention continuously as the usual prenatal care, until the time of birth in January, immediately following which she died.

Insofar as subdivision (b) of Section 15 of the aforesaid Ordinance provides that:

> "Upon the death before retirement, * * * *, of a member while in the city-service, or within four months after the discontinuance of city-service, or while physically or mentally incapacitated for the performance of his duty, if such incapacity has been continuous from discontinuance of city-service, * * *,"

a question arises as to whether this decedent may be deemed to be in the indicated exemptive category on account of the related facts.

OPINION.

The above quoted resolution of the Board of Education

in my opinion, has the effect of presuming that a teacher who becomes pregnant is either physically or mentally incapable of giving proper attention to her duties, at least, during a period of approximately six months before delivery. Furthermore, there is an obligation upon such a person in the school department to absent herself from her duties, thereby causing, in some instances, an involuntary cessation of service at a time longer than four months from the anticipated event.

It would appear that this conclusion of the school department is fortified by the fact that during the period of absence of this teacher she was being attended by a doctor for prenatal care. At least, such a situation suggests a continuing incapacity during the time of absence.

As pension statutes serving a beneficial purpose should be liberally construed, in view of the foregoing, I am of the opinion that the decedent since discontinuance of her city-service was continuously incapacitated to physically perform her functions as a teacher.

You are advised, therefore, to pay her beneficiary the full death benefit provided by said Ordinance.

Respectfully,

CITY ATTORNEY.

To the -
Retirement Board.

#7.

March 22, 1935

SUBJECT: Cost of Hetch Hetchy Dam Exceeding Amount of Bonds.

Sir:

You have asked me if the city may legally enter into contracts and incur liabilities for the raising of O'Shaughnessy Dam of the Hetch Hetchy Project in view of the fact that the people voted bonds in the amount of $3,500,000 and the now estimated cost of the project will be approximately $4,000,000.

FACTS

Plans and estimates of cost of raising O'Shaughnessy Dam approximately 85 feet over its present height for the purpose of developing this reservoir to its ultimate capacity as contemplated under the original plan of the Hetch Hetchy Project, were made by the Engineering Department more than a year and a half ago. The estimates then showed that three and a half million dollars would be ample to complete this construction.

It is now estimated that the cost of raising the dam will be approximately $4,000,081. In short, the additive factors over the original estimates during the year and a half pending between the time of the first estimate and as of the present date when the work is sought to be performed, are caused by reason of the higher cost of labor, materials, and added construction required by the Government, until the project will now cost approximately $4,000,081, as compared with the $3,500,000.

On November 7, 1933, a bond issue was submitted to the voters of San Francisco to incur a bonded debt in the amount of $3,500,000, which was approved by more than two-thirds of the electors voting on the proposition.

The query you present, as stated at the outset of this opinion was, in view of the people authorizing a three and one-half million dollar project, that was thought to amply cover the cost of the construction, may the city now build this addition to the dam when it is found to cost $4,000,000?

OPINION

Ordinance No. 15.0311, approved October 16, 1933, called a special election to be held on November 7, 1933, to submit to the people a proposition to incur a bonded debt in the amount of $3,500,000, for the purpose of increasing the storage capacity in the Hetch Hetchy Reservoir, insuring an eventual delivery to the

city of 400,000,000 gallons of water daily. Section 2 of this ordinance, in part provides:

> "The said bonds shall not be offered for sale or sold unless the United States Government through the National Industrial Recovery Act or other legislation or the Administration Board or Body functioning thereunder shall make or agree to make a grant to the municipality of not less than 30 per cent of the cost of the labor and materials employed upon the improvements described in Section 1 hereof."

A Grant Agreement has been authorized by the Government under which the city will sell its bonds and the Government will then, as proof is submitted to the proper authorities, pay to the city 30 per cent of the cost of labor and materials as found by the Government to be used on the project.

In Ordinance No. 15.0311 it is recited in Section 2 thereof that the Board of Supervisors by Resolution No. 1046 recited the estimated cost of the improvement would be $3,500,000. It is to be noted that throughout the ordinance and resolution referred to, the words estimated cost are used.

The amount of money available for this construction will be $3,500,000 plus whatever premium may be obtained from the sale of bonds representing this sum, plus the 30 per cent of the cost of all labor and materials employed on the project.

Disregarding for the time any premium that the city may obtain from the sale of its bonds, the city will have at least the par value of the bonds when sold of $3,500,000, plus the $798,000 grant from the Government, making a total amount available for this project of $4,298,000.

A careful study of the ordinance calling the election and the argument submitted to the voters urging the approval of the bond issue failed to disclose any inhibition against applying the 30 per cent of the cost of labor and materials to be received from the Government toward the cost of the project.

The use of the words estimated cost throughout the resolution and ordinance above referred to, brought to the attention of the voters that it was not the actual cost and put the public on notice that it was in fact an estimate.

In the facts under consideration, however, the city in nowise increases the amount of bonded indebtedness authorized by the vote of the people. In fact, the figures disclose that

ality of an, perhaps, lesser or minor kind. Lenin's is not [illegible]. In part [illegible]:

> [illegible] will not be allowed [illegible] to [illegible] for [illegible] [illegible] [illegible]

the proceeds from the sale of the bonds and the Government's contribution are sufficient to complete the dam.

It is not an unreasonable construction, but in fact a very reasonable one, in view of the language employed by the resolution and ordinance covering the bond issue and the argument to the voters concerning the same that it was not intended to limit the cost of the project to three and one-half million dollars. This must be quite evident, as had the framers of the ordinance calling the election and the people approving the same intended that the project would not cost more than $3,500,000, such language carrying this inhibition would have been used; but throughout, as has been said before, the words estimated cost are used, and nothing to the effect of not exceeding, or actual cost, or words of similar import.

In the case of WILLIAMS v. CITY OF STOCKTON, 195 Cal. 743, bonds in the amount of $600,000 were issued for the purpose of building a city hall for the City of Stockton. Cost of materials increased between the time the bond election was held and the entering into a contract for the building, so that the total cost of the project exceeded the bond issue by about $90,000. In passing on matters relative to what constitutes an estimated cost and the right to exceed the estimated cost, the Court, at page 756-7, held:

> "'The estimated cost of the municipal improvement referred to under the designation of Proposition 1 in the preceding section of this ordinance is the sum of $600,000.' The amount provided for city hall purposes was therefore merely an estimate. In spite of due diligence on the part of the city officials in furthering the project to the point of letting the contracts, over two years and a half elapsed, and in the meantime the cost of building construction had increased from twenty to twenty-five per cent. It quite often inevitably happens that the ultimate cost of a proposed public improvement exceeds the preliminary estimate. If the city authorities having the power and responsibility of proposing the bond issue have not, by the form employed in submitting the proposition to the electors, confined themselves to an absolutely definite and inflexible plan of construction and expenditure and have proceeded in good faith in accordance with the program based upon estimated costs, no good reason appears why they should not be permitted to continue with the improvement to the extent of the funds available."

[illegible]

[illegible]

[illegible]

[illegible]

In the above cited case it is to be noted that the bonds for the building of the city hall sold at par of $600,000 and a premium of $50,556. The sum of $4,146 was realized from the sale of buildings on the land on which the city hall was to be erected and for rental of the site for a month, leaving a total in the fund of $654,702. While the bond issue was only for the sum of $600,000, the opinion is to the effect that the additional sums totaling $54,702 could be used for the project in question.

The case was cited with approval in

CITY OF OAKLAND v. WILLIAMS,
107 Cal. App. 542,

which holds that premiums realized from the sale of bonds must be used for the construction of the project contemplated under the bond issue and not to be used for interest on or redemption of bonds until the project was fully completed.

In the case of EL DORADO IRRIGATION DISTRICT v. BROWNE, 216 Cal.269, where a substantial change in the plans of the construction was made after bonds were issued, it is held that the irrigation district directors may adopt the modified plans, which reasoning in the case would apply to the changes made by the United States Reclamation Engineers in the original plans of raising the O'Shaughnessy Dam.

VILLAGE OF OSHKOSH v. STATE OF NEBRASKA,
20 F. (2d) 621

In the above cited case it appears the statutes of Nebraska permitted a village to construct a lighting and waterworks system by a tax of 5 mills on the dollar and if the amount realized was not sufficient, bonds could be issued to the extent of 10 per cent of the taxable value of the property in the village. This was done, but the cost of the project exceeded the limitations from the proceeds of the tax and bonds. It was contended the city was limited to contract for the cost of the project only to an amount realized from the taxes imposed and the sale of bonds. The U. S. Circuit Court of Appeals ordered a writ of mandate compelling the taxing authorities of Oshkosh to include in the tax rate an amount sufficient to pay the claim of Fairbanks Morse & Co. which claim exceeded the sums realized from taxes and bonds, holding, among other things, that the restriction on the amount of bonds or taxes imposed by the statute was not to be taken as a limitation on the cost of the plant or on the express power of the village to contract for the construction of such a plant.

It is therefore my opinion that as the voters were

aware that they were authorizing the incurring of a bonded debt for a project, the cost of which was merely estimated, and that they imposed a restriction of obtaining assistance from the United States Government to build the project, which assistance has been guaranteed, that the amount realized from the sale of the bonds is not to be considered as a limitation of the cost of the project. The city is justified in incurring liabilities in addition to the bond issue for the completion of the project and you have the legal authority to certify to all necessary contracts and charges when the money is available. The expenditure of the moneys obtained from the Government by way of grant and the premiums that the bonds may bring may be applied to the cost of raising O'Shaughnessy Dam.

Respectfully submitted,

CITY ATTORNEY

To the

Controller

(2)

April 5,1935.

SUBJECT: Acting on Appeal after
Death of Applicant.

Dear Sirs:

I have your request that I advise you if you have the right to determine an appeal taken against the granting of a permit to operate an automobile supply station after the applicant has died, and if so, to whom should the permit be issued. I understand that the application for the permit was made by one Richard Faulkner to the Chief Engineer of the Fire Department, and in due course was granted and that certain interested persons have appealed to your board from the granting of the same, and that pending the appeal Mr.Faulkner has died, and the executor of his Will is now asking for the permit.

OPINION.

The deceased applicant now being represented by the executor of his Will the matter is still pending before your board and you have the right to determine the appeal to the same extent as if applicant was still living. The fact that the applicant has died does not take the permit away from his estate. The permit was issued in due course by the proper authority and continues to stand as a valid permit unless the appeal taken against its issuance is sustained as provided by Charter. A citation of authorities is not necessary to show that a permit such as the one which is now before you is a property right. This being the case the right is transferred to the executor of the deceased owner to be dealt with as the Court shall deem proper in the matter of the administration of the estate, due regard of course being had for all of the conditions under which it was issued. The permit having passed from the deceased to his executor by operation of law the consent of the granting authority is not necessary to validate the transfer.

Therefore you are advised that you have the full right to consider and determine the pending appeal and if the appeal is not sustained the permit will remain issued in the name of the deceased with full authority to the granting power to order it transferred to the executor for the purpose of administration or to such other persons as the Court by proper order may direct.

Respectfully,

City Attorney.

BOARD OF PERMIT APPEALS.

April 1, 1958.

SUBJECT: Rating on appeal after
Death of Applicant.

Dear Sirs:

I have your request that I advise you if you have the right to determine an appeal taken against the granting of a permit to operate an automobile supply station after the applicant has died, and if so, to whom should the permit be issued. I understand that the application for the permit was made by one Richard Faulkner to the Chief Engineer of the Fire Department, and in due course was granted and that certain interested persons have appealed to your board from the granting of the same, and that pending the appeal Mr. Faulkner has died, and the executor of his will is now asking for the permit.

OPINION.

The deceased applicant now being represented by the executor of his Will the matter is still pending before your board and you have the right to determine the appeal to the same extent as if applicant was still living. The fact that the applicant has died does not take the permit away from his estate. The permit was issued in due course by the proper authority and continues to stand as a valid permit unless the appeal taken against its issuance is sustained as provided by Courts. A citation of authorities is not necessary to show that a permit such as the one which is now before you is a property right. This being the case the right is transferred to the executor of the deceased owner to be dealt with as the Court shall deem proper in the matter of the administration of the estate, due regard of course being had for all of the conditions under which it was issued. The permit having passed from the deceased to his executor by operation of law the consent of the granting authority is not necessary to validate the transfer.

Therefore you are advised that you have the full right to consider and determine the pending appeal and if the appeal is not sustained the permit will remain issued in the name of the deceased with full authority to the granting power to order it transferred to the executor for the purpose of administration or to such other persons as the Court by proper order may direct.

Respectfully,

City Attorney.

BOARD OF PERMIT APPEALS.

April 25, 1935.

UBJECT: Power of the Board of Education to Appoint a Non-certificated Personnel Technician Exempt from Civil Service Provisions.

entlemen:

This office is in receipt of your request for an opinion, as ollows:

REQUEST

"The Board of Education continuously finds the necessity of passing upon numerous personnel matters such as the appointments, assignments, transfers and dismissal of substitute, temporary, probationary and permanent teachers. These actions must be taken in accordance with both the state school code and the charter of the City and County of San Francisco. It is often difficult to ascertain when a temporary teacher becomes a probationer, when a substitute teacher is in open position and attains probationary status, when a probationary teacher becomes permanent, when a position is an emergency or temporary one, so as to allow the appointment of a substitute, when a teacher may be appointed as temporary as distinguished from a substitute, and numerous similar situations. Then there are intricate problems of salary ratings which require expert and technical knowledge of, not only the above mentioned laws, but also of the rules of the Board of Education, in order to adjust the certificated employees to their proper salary status. The results of a misapplication of the above, due to a lack of expert knowledge of these subjects have been demonstrated by the fact that there are over two hundred lawsuits pending before our superior courts at the present date, not only resulting in a great monetary expense, but also disrupting the harmony of the entire school department.

"We have certificated employees dealing with personnel, whose duties consist in recommending the proper certificated employees from an educational viewpoint for appointments, assignments, transfers, etc. However, it often happens that such recommendations cannot be properly made because they are in conflict with either the state law, city charter, or board rules, and consultation with an expert on these matters is essential. It often happens that an emergency arises when action must be taken at once, and then the value of having such advice at hand becomes apparent. This advice is needed constantly throughout the day when there is not time to consult the City Attorney and receive an answer.

[illegible]

April [illegible], 1944.

[illegible]: Power of the Board of Education to appoint a Non-certificated Personnel Technician Exempt from Civil Service Provisions.

[illegible]:

This office is in receipt of your request for an opinion, as follows:

"The Board of Education continuously finds the necessity of placing open reserves, personnel workers such as the appointments, assignments, transfers and dismissal of substitute, temporary, probationary and permanent teachers. These actions must be taken in accordance with both the state school code and the charter of the City and County of the Presidents. It is often difficult to ascertain when a temporary teacher becomes a probationary, when a substitute teacher is to open position and attains probationary status, when a probationary teacher becomes permanent, when a position is an emergency of temporary use, or is to allow the appointment of a substitute, when a teacher may be appointed as temporary or distinguished from a substitute, and numerous similar situations. Then there are intricate problems of salary ratings which require expert and technical knowledge of, not only the above mentioned laws, but also of the rules of the Board of Education, in order to adjust the certificated employees to their proper salary status. The results of a classification of the above, due to a lack of expert knowledge of these subjects into been demonstrated by the fact that there are over two hundred lawsuits pending before our superior courts at the present date, not only resulting in a great monetary expense, but also disrupting the harmony of the entire school department.

"To have certificated employees dealing with personnel, whose duties consist in recommending the proper certificated employees from an educational viewpoint for appointments, assignments, transfers, etc. However, it often happens that some recommendations cannot be properly made because they are in conflict with either the state law, city charter, or board rules, and consultation with an expert on these matters is essential. It often happens that an emergency arises that action must be taken at once, and then the value of having such advice at hand becomes apparent. This advice is needed constantly throughout the day when there is not time to consult the City Attorney and receive an answer.

"The Personnel Committee of the Board of Education has found it necessary to have the assistance of such technical advice prior to and during its committee meetings, in order that it may not recommend to the Board of Education illegal actions.

"We have also found that such an employee is needed to call the attention of the certificated employees of the Board of Education and the Board of Education, itself, to opinions of the City Attorney's office, when actions are contemplated contrary to said opinions; also, as to the correct interpretation and application of these opinions. Then, again, because of the involved and intricate situations, there are numerous occasions when a legal matter arises which should require an opinion from the City Attorney, and it is essential to have such an employee call the same to the attention of the Board of Education and frame the proper questions. Our past experience has demonstrated that misunderstandings have arisen due to the failure to ask the proper questions of the City Attorney at the proper times and then correctly interpret the opinions upon their receipt, with the results of great expense, much dissatisfaction among the teachers, and even threatened criminal prosecutions for failure to observe the law.

"In view of the above needs, we believe that a non-certificated employee with the proper technical training and experience would prove valuable to our School Department. Such an employee would be valuable because he would have independence of action, as under the law he would not be subject to the same control as are the certificated employees. We desire to know whether or not, in view of Section 135 of the Charter of the City and County of San Francisco, the Board of Education has the right to employ such a person without calling for a Civil Service examination."

OPINION

Section 135 of the Charter of the City and County of San Francisco provides that the Board of Education shall have the power to employ such teachers and other persons as may be necessary to carry into effect its powers and duties. The same section provides that non-teaching and non-technical positions shall be filled under the civil service provisions of the Charter. Although this provision is worded in the negative, it becomes apparent that "teaching" positions and "technical" positions need not be filled in accordance with the civil service provisions of the Charter. In interpreting a statute or ordinance, each word and phrase must be given a meaning, if possible. If the framers of the Charter had intended only to exclude teaching positions from civil service provisions,

"The personal qualities of the chief of industries that trend is necessary to have the assistance of well trained advice prior to and during the consulting service, in order that it may not recommend to the board of directors illegal actions.

"We have also found that such an analysis is needed by well the assessment of the industrial conditions of the board of directors and the board of management. Finally, by [illegible] of the city industry's affairs, when actions are [illegible] technical industry is with [illegible] view, as to the proper interpretation and application of these opinions. Then, since [illegible] of the involved and indirectly affected, there are [illegible] which [illegible] should [illegible] [illegible] the city attorney, and it is essential [illegible] [illegible] of the [illegible] [illegible] [illegible]

then there would have been no purpose in adding the words "and non-technical". It is my opinion that in framing the powers of the Board of Education, the freeholders intentionally desired to give to that body the right to employ such a technical employee without being hampered by Civil Service provisions. It should also be remembered that the Courts of Appeal of California have held that the City and County of San Francisco is a municipal corporation, and an entity separate and apart from the San Francisco Elementary School District and the San Francisco High School District, which districts are not a part of the City and County of San Francisco, a municipal corporation.

See: ESBERG v. BADARACCO,
202 Cal. 110;

MITCHELL v. HARTMAN,
112 Cal. App. 370.

Thus, any restrictions set up by the Charter which attempt to curtail its powers must be strictly construed against the restrictions. The Civil Service Commission has no control over the employees of the Board of Education except as set forth in Section 135 of the Charter, which limits this control to that of the non-technical help, such as clerks, janitors, etc.

The old charter of the City and County of San Francisco failed to include the word "technical" in setting forth the persons who could be employed by the Board of Education exempt from civil service requirements, but merely provided for the teaching force. The inclusion of that term in our present charter demonstrates conclusively that the freeholders intended to grant such a right to the Board of Education.

From the above, I can only reach the conclusion that the San Francisco Board of Education has the right to employ a technical employee who is non-certificated, and be exempt from civil service provisions of the Charter. Of course, it is a question of fact in each instance as to whether or not an employee is filling such a technical position. From the duties detailed in your request, it appears that the position you contemplate filling is a technical one of the highest nature. This is also based upon my personal knowledge of such duties.

It is my conclusion that the Board of Education has the power to make such an appointment without any reference to the Civil Service Commission.

Respectfully,

CITY ATTORNEY

BOARD OF EDUCATION

[illegible]

April 25, 1935.

SUBJECT: Advertising for bids for Supplies Portion of which are to be Delivered during the Present Fiscal Year and Balance delivered in Next Year.

Dear Sir:

I have your letter reading as follows:

"In order to make possible deliveries of wearing apparel when needed, the Department of Public Health has requested that we invite bids at this time for the merchandise, one-half the quantities to be taken during the current fiscal year and the remainder in the subsequent or 1935-1936 fiscal year.

"Under our present legal procedure, the Controller of course cannot encumber the entire fund during this fiscal year, inasmuch as partial delivery will be made during the coming term. What we desire in the matter is to invite bids at this time with the understanding that specific amounts will be taken during both the present and the ensuing fiscal years, and it has occurred to us that perhaps legally the invitation to bid should contain this information.

"Accordingly, we are attaching a copy of our standard form for inviting bids and will thank you to modify the language if necessary so as to accomplish what is desired. If no change is required will you please so advise us promptly in order that bids may be invited without delay."

OPINION.

Ordinarily it is not permissible for a municipality to contract an obligation during one fiscal year and to pay it out of the income of the succeeding fiscal year. I note, however, from your communication that only one-half of the supplies intended to be purchased are to be used during the current year or paid for out of the funds thereof. Therefore, if you provide, in the invitation for bids in this particular matter, that a portion of the goods will be received and paid for during the current year and the remainder thereof during

the succeeding year and that the purchase price therefor shall be payable only upon the delivery of the goods, the city is creating two distinct operations one to be performed during the current year and one in the succeeding year. Such a contract does not act within the prohibitions of Section 18 of Article XI of the State Constitution.

See: McBEAN v. CITY OF FRESNO, 112 Cal. 159;
DOLAND v. CLARK, 143 Cal. 176;
POSZ v. TAYLOR, 61 Cal.App. 523.

As far as the Controller certifying to the contract is concerned, it appears to me that if he would approve each purchase order as you place it under the contract, he would be complying with the provisions of the Charter and the bidder would be assured of obtaining the purchase price for his goods as they were delivered.

I would suggest that you include in your invitation for bids the following language:

"Dry goods and wearing apparel requirements for _____ months delivery of one-half thereof to be accepted during the current fiscal year and the balance in succeeding fiscal year; purchase price to be payable only upon delivery of goods."

Respectfully submitted,

_____
CITY ATTORNEY.

To the -
Purchaser of Supplies.
Copy to The Controller.

#1

April 26, 1935.

SUBJECT: In Re, Appointment of
Marine Stokers.

Dear Sirs:

I have your request that I advise you as to the age limitation applying to the appointment of marine stokers in the Fire Department and also as to the pension rights of those appointed to these positions pursuant to the provisions of our present charter.

OPINION.

In order that there may be no misunderstanding upon the subject, it is important that we should give consideration to the provisions of the old charter as well as to those of our present charter. Under the old charter there was an age limitation of 35 years upon all of those who entered the service of the Fire Department and who would be entitled to the benefits of the pension provisions of the charter.

Section 6 of Chapter I, Article IX, made certain exceptions from the general provisions, the principal exceptions being that engineers and pilots of fire boats, and engineers, mechanics and employees of the auxiliary fire system or of the corporation yard were not subject to the age limitation of 35 years and were permitted to enter the service up to the age of 55 years, provided that persons in these positions were not subject to, nor would they derive any benefits from, the pension provisions of the old charter relative to the Fire Department. It must be noted that marine stokers were not included within the exemptions and, up to the time of the adoption of the new charter, it was the practice of the Civil Service Commission and of the Fire Department to appoint to the position of marine stoker only those who were not over the age of 35 years.

This being the case, and to the end that there may be no confusion relative to pension rights of those appointed to the position of marine stoker under the provisions of the old charter, let it be understood that those who were so appointed and were not, at the date of their appointment, over the age of 35 years, are entitled to the benefits of the pension provisions provided in the old charter for members of the Fire Department.

This brings us to the provisions of the present charter. Section 145 of our present charter provides that applicants for entrance positions in the uniformed forces of the Fire and Police Departments shall not be less than 21 years of age nor more than 35 at the time of their appointment and shall have the physical qualifications required for enlistment in the United States Army, Navy and Marine Corps.

QUERY: Is a marine stoker a member of the uniformed force?

Certainly when a marine stoker is engaged in the operation of stoking his engine he does not usually wear a uniform. It may be possible that at certain times he is permitted to wear a uniform but, unlike the ordinary fire fighting force of the department, he is not compelled to wear that uniform while in active duty.

It is also to be noted that applicants for entrance positions in the uniformed forces shall have "the physical qualifications required for enlistment in the United States Army, Navy and Marine Corps". I understand that it has not been the custom to require these qualifications for pilots, engineers or stokers of fire boats but that they are applied to the remainder of the fire fighting force.

I am therefore of the opinion that a marine stoker is not a part of the uniformed force of the Fire Department and therefore is not subject to the age limitation. This being the case, persons in these positions are not entitled to the retirement benefits provided for by Section 162 of the charter for members of the Fire and Police Departments, but they are entitled to the ordinary benefits provided for other employees of the City and County.

Respectfully submitted,

_____
CITY ATTORNEY.

To the -
Fire Department.
C.C. to the -
Civil Service Commission.

#1

May 6, 1935.

SUBJECT: Lease of Property by City.

Gentlemen:

This office is in receipt of your request for an opinion, as follows:

REQUEST

"Has the City and County of San Francisco the power to lease property for office purposes and, if so, is there any limitation on the length of the term of the lease?"

OPINION

Section 2 of the 1932 Charter expressly authorizes the city to enter into a lease.

Section 91 of the same charter provides in part as follows:

"Each department authorized by the approval of bond issues or by annual or supplemental appropriation ordinances to purchase or lease property or improvements needed for the purposes of such department shall make such purchases or leases through the director of property. He shall make a preliminary valuation of the property to be acquired or leased and report the same to the department requiring such property. For such purposes he may employ independent appraisers. He shall conduct negotiations with the owner or owners thereof, at the conclusion of which he shall report the terms on which such sale or lease may be concluded, together with his recommendation thereon."

The foregoing provision of the charter seems to be the only one dealing with the procedure of the municipality when entering into a lease as lessee. You will note that in this charter provision there is no limitation with respect to the length of the term.

Section 93 of the same charter provides that the city may lease its property for a period not to exceed twenty years. Thus, it is reasonably certain that the charter framers intended that the municipality might enter into a lease as lessee for a reasonable period of time, whereas as lessor, the municipality was intended to be restricted in its powers.

Notwithstanding the provisions of Section 18, Article XI of the Constitution, there seems to be no doubt that the City and County of San Francisco has the right to enter into a lease when authorized by the charter.

See: DOLAND v. CLARK,
143 Cal. 176;
McBEAN v. CITY OF FRESNO,
112 Cal. 166;
SMILIE v. FRESNO COUNTY,
112 Cal. 312;
IN RE CITY AND COUNTY OF SAN FRANCISCO,
195 Cal. 426;
AMERICAN PRESS v. CITY OF ST. LOUIS,
284 S. W. 482;
18 CAL. JURIS. 1006,
3 McQUILLIN ON MUNICIPAL CORPORATIONS,
(2d) 714.

I call your attention, however, to the language contained in McBEAN v. CITY OF FRESNO, supra, wherein the court held that the law looks with disfavor upon long term contracts.

In view of the foregoing, I am of the opinion that the City and County of San Francisco, as lessee, may enter into a lease to cover its needs, for a reasonable period of time. The exact period of time which the law would permit is not certain, but I would say that the condition of the real estate market, the rental value of real estate, the cost of buildings and general economic conditions would enter into the factors determining the reasonability of the length of the term of the lease.

Respectfully,

CITY ATTORNEY

BOARD OF SUPERVISORS

#3

May 15,1935.

SUBJECT: A Widow of Pensioner in Fire Department who was Married to Decedent one year prior to Retirement date,but during Retirement Period Divorced and Remarried Pensioner, is Entitled to Continuation of Benefit.

Gentlemen:

This acknowledges receipt of your letter, dated April 25,1935, wherein you request my interpretation of certain provisions of the Charter in view of a situation outlined in said communication.

The facts alluded to are recited by you in this manner:

"The Retirement Board, at the meeting held Tuesday, April 23,1935, directed me to state the facts surrounding the application of Sarah E. Muldowney for a continuation to her of her deceased husband's pension, and to ask your opinion on her status under the Retirement System.

Thomas J. Muldowney was retired for service on October 16,1918, in accordance with Section 3, Chapter 7,Article 9 of the Charter then in effect. The Charter then did not provide for the continuation of the retirement allowance to the widow after the death of the retired member.

In the month during which Mr. Muldowney was retired, his wife, Sarah E. Muldowney, to whom he was married in May,1907, secured an interlocutory decree of divorce. At the end of a year, or shortly thereafter, she secured the final decree.

At the general election, held November,1928, an amendment to the Charter was adopted, under which pensions being paid to firemen retired for service, would be continued at their death to their surviving wives. This was interpreted as applying also to persons retired prior to the date when the amendment was adopted.

In May,1925, Thomas J. Muldowney and Sarah E. Muldowney were remarried and continued in that state until his death on April 15,1935.

Subdivision (a), Section 169 of the present Charter (last sentence on page 95) says that "should any said retired member die, leaving a widow who shall have been married to the decedent at least one year prior to the date of his retirement, such widow shall,as long as she may live and remain unmarried, be paid said pension."

In the light of the facts as recited in this letter, you are requested to give the Retirement Board your opinion as to whether Sarah E. Muldowney, surviving wife of Thomas J. Muldowney, is entitled to the continuation of her husband's pension."

The language found in Subdivision (a) of Section 169 of the Charter is very clear and to the effect that any retired member of the Fire Department who dies leaving a widow, who shall have been married to the said member at least one year prior to the retirement date is entitled to a continuation of said pension to her as long as she remains unmarried.

The necessary factors to warrant such continuation of benefit are that the recipient is the widow at the time of the death of the pensioner and that she had been married to the decedent for one year, at least, prior to the date of the retirement of the member. There is no provision in the section for a continuity of the marital status during the period of retirement and we cannot presume such a condition to be necessary before the enjoyment by the widow of this benefit.

The facts related in the correspondence satisfy the terms upon which the continuation of pension is to operate and you are advised to act accordingly.

Respectfully,

City Attorney.

RETIREMENT BOARD.

May 16, 1935.

SUBJECT: Lending Money on Notes.
Ordinance No. 8969 (New Series).

Gentlemen:

Under date of May 7, 1935, you submit the question as to whether or not the Pacific Premium Finance Plan, a California corporation, comes within the provisions of Ordinance No. 8969 (New Series) and whether it is required that said company secure a permit from your Honorable Board prior to the issuance of a license. You furnish us with a copy of the so-called Premium Agreement of said Pacific Premium Finance Plan from which it appears that said corporation agrees to pay premiums on insurance policies exacting in return from the borrower an agreement as follows:

> "In consideration of the Company paying said premiums and rendering further and other services with reference to said policies, all at the request of the Insured, the Insured promises to pay to the Company in gold coin or legal tender of the United States of America, on the day and year first above written, the sum of _____ Dollars (write in amount of down payment) together with an additional sum of _____ Dollars (write in amount of balance) in installments as follows, to-wit:"

These installments are made payable monthly thereafter.

OPINION.

The question involved herein is: "Is this corporation lending money on notes?"

Section 3265 of the Civil Code defines a negotiable promissory note, in substance, as follows: A promissory note is an unconditional promise in writing, made by one person to another, signed by the maker, to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer.

While the Premium Agreement does not constitute a negotiable instrument because of other terms and conditions contained therein, it is my opinion that such an instrument as is outlined in said contract is a promissory note.

"A note may be valid as a non-negotiable instrument though not containing all the provisions necessary to make it negotiable."

UNIVERSITY OF SOUTHERN CALIFORNIA v. BRYSON,
103 Cal.App. 139.

You are therefore advised that it is necessary that said Pacific Premium Finance Plan secure from the City and County of San Francisco a license for engaging in the business or occupation of lending money on notes and that before said license shall be issued it is the duty of said corporation to procure from the Board of Police Commissioners a permit to engage in this said business.

Respectfully submitted,

CITY ATTORNEY.

To the -
Board of Police Commissioners.

#4

May 20, 1935.

SUBJECT: Powers of the Board of Permit Appeals.

Gentlemen:

This office is in receipt of your request for an opinion as follows:

REQUEST

"A question has arisen with respect to the power of the Director of Works and the Board of Permit Appeals in acting upon building permits, upon which question your opinion is respectfully solicited.

This question arises upon the following state of facts:

A billboard company has applied for a permit to erect a billboard upon certain leased ground. An adjoining property owner objects to having a billboard adjacent to his premises. The objecting property owner conducts an undertaking establishment, and the proposed billboard will be erected close to a blank wall of the undertaking establishment. There are no windows in the wall which will be blocked by the billboard. Close to the top of the wall the undertaking establishment has its own sign announcing its business. So far as this board knows, this sign will not be blocked by the proposed billboard. The objection of the undertaking establishment seems to be based more upon aesthetic consideration than upon any concrete injury that will be done its premises.

The foregoing facts are stated somewhat fully, although they may not be necessary to a decision of the question hereafter submitted.

Ordinance No. 3.0411 provides, in the last clause of Section 3 thereof; 'In the granting or denying of any permit, or the revoking or the refusing to revoke any permit, the granting or revoking power may take into consideration the effect of the proposed business or calling upon surrounding property, and upon its residents, and inhabitants thereof; and in granting or denying said permit, or revoking or refusing to revoke a permit, may exercise its sound discretion as to whether said permit should be granted, transferred, denied or revoked.'

This Board has held that it has upon review the right and duty of exercising the same discretion as the granting or revoking power. We think in this view you have at least informally concurred, and it was so held by Judge Godell in Scott vs. City and County. You will note from the above quotation that it purports to relate to any permit.

However, Section 1 of the same Ordinance apparently puts a limitation on the whole ordinance as follows:

'The classes of permits referred to in this section are: automobile supply stations, automobile parking stations, automobile repair shops, public garages, commercial garages, dyeing and cleaning works, hospitals of any character, places of refuge and detention, laundries, junk yards or premises, livery stables, riding academies and riding schools, auctioneers, pawn brokers, second hand dealers, second hand clothing dealers, and second hand furniture dealers.'

And Section 2 provides that all other applications, transfer or revocation of permits shall be subject to action on or issuance by the department or office specified by law or ordinance; Section 18 of Ordinance 2107, the Bill-Board Ordinance, directly declares that it is unlawful for any person *--* to erect any billboard or other board without first obtaining a building permit therefor, from the Board of Public Works.

Ordinance No. 9152, providing for the establishment of a central permit bureau, directs that bureau upon receiving an application for a permit for the erection of a billboard, to refer the same to the City Planning Commission and Bureau of Building Inspection. We may state parenthetically that we are at somewhat of a loss as to why the application for a billboard should be referred to the City Planning Commission, because there is no limitation in the zoning ordinance upon the erection of billboards.

The question therefore seems to be:

Has the Director of Works, and the Board of Permit Appeals discretionary powers with respect to granting or denying an application for a permit to erect a billboard.

The question is thus stated, with a full realization that it may be put on too narrow a foundation, and perhaps should be:

Has the Director of Works and the Board of Permit Appeals the right to exercise discretion in granting or denying building permits?

In other words, in granting or denying a building permit, are we limited to a determination as to whether or not the proposed building or structure conforms to and complies with the building laws of the State of California and the City and County?

We suggest that perhaps the last question is a more correct statement of the question involved, in as much as we have been unable to find any distinction between a permit to erect a billboard, and a permit to erect any other structure or building. If there is no distinction between the erection of a billboard and any other structure, and the question is taken as last put, the matter becomes of great importance for the reason that we are constantly being importuned to deny building permits which conform to the law, solely upon the ground that the erection of the structure or building will have an adverse effect upon surrounding property and upon its residents and inhabitants.

In other words, to deny these applications upon the authority found in Section 3 of Ordinance 3.0411.

The question is, therefore, important, and your opinion will be greatly appreciated."

OPINION.

In order to form an opinion in regard to your request, it is necessary to completely ignore the provisions of the ordinances mentioned in the request, and arrive at a basis of reasoning with regard to the charter provision creating the Board of Permit Appeals.

The Board of Permit Appeals came into existence by virtue of the provisions of Section 39 of the 1932 Charter. The pertinent portion of this section is as follows:

"Any applicant for a permit or license who is denied such permit or license by the department authorized to issue same, or whose license or permit is ordered revoked by any department, or any person who deems that his interests or property or that the general public interest will be adversely affected as the result of operations authorized by or under any permit or license granted or issued by any department, may appeal to the board of permit appeals. Such board shall hear the applicant, the permit-holder, or other interested parties, as well as the head or representative of the department issuing or refusing

to issue such license or permit, or ordering the revocation of same. After such hearing and such further investigation as the board may deem necessary, it may concur in the action of the department authorized to issue such license or permit, or, by the vote of four members, may overrule the action of such department and order that the permit or license be granted, restored or refused."

There is no language in this section which expressly gives to the Board of Permit Appeals discretionary powers. If the Board of Permit Appeals has any discretionary powers, such powers must have been obtained by implication. It would seem reasonable to assume, before proceeding further, that there would be no need of the Board of Permit Appeals if such Board had no discretionary powers. This is so for the reason that, if the Board had no such powers, it would have the power solely to determine whether ordinances or other laws were or were not complied with by a municipal department. In other words, it would be a rubber stamp body. It is difficult to believe that the charter framers intended that the Board of Permit Appeals, a lay body, should have only the power to pass upon language contained in ordinances or other laws.

Judge C. J. Goodell, in the case of HALL vs. CITY AND COUNTY OF SAN FRANCISCO, Superior Court No. 238,725, in a written opinion concerning the discretionary powers of the Board of Permit Appeals, used the following language:

"Chief Brennan testified that in handling cases of this type, he makes it his practice to consider not only fire hazards, fire fighting and kindred problems, but traffic-congestion problems as well. Section 3 of Ordinance 3.0411, however, gives him the power to go further, if he sees fit, and consider 'the effect of the proposed business or calling upon surrounding property and upon its residents, and inhabitants thereof'. This is very broad and general language and when taken in connection with what follows it, seems to me to vest in the tribunal to whom application is first made a discretion considerably wider than that vested in the Board of Supervisors by the amendment to Ordinance 2659. I am satisfied that the Board of Permit Appeals must have the same discretion, in the absence of words of limitation in the Charter."

In view of what I have already said and in view of the foregoing quotation, I am convinced that the Board of Permit Appeals has discretionary powers in certain cases. We are now confronted with the question of when discretionary powers may be assumed by the Board.

In Ex Parte LACEY, 108 Cal. 326, the Court held, in effect, that a permit, ordinance or law not having any relationship to the police power arbitrarily interferes with personal liberty and private property without due process of law.

In Ex Parte HADACHECK, 165 Cal. 416, the Court held that the power to regulate the use of property or the conduct of a business is not arbitrary and that a restriction must bear a reasonable relation to some legitimate purpose within the purview of the police power.

Thus, we have squarely before us the legal proposition of whether the Board of Permit Appeals has discretionary powers in matters coming within the scope of the police power, such as regulations for the benefit of the public health, welfare, etc., of the community. If the Board of Permit Appeals has any discretionary powers whatever, they must be those coming within the scope of the police power, and I am constrained to so hold. However, the powers of the Board of Permit Appeals, with respect to property and property rights not within the scope of the police power are apparently quite another thing and, in view of the decisions cited by me, I do not believe that the Board of Permit Appeals can arbitrarily decide matters not in any wise related to the police power. In such cases the duty of the Board of Permit Appeals extends solely to the determination of whether the persons or corporations involved have complied with local ordinances or state laws.

In VARNEY & GREEN vs. WILLIAMS, 155 Cal. 318, at page 320, the Court said:

> "Bearing in mind that the ordinance does not purport to have any relation to the protection of passers-by from injury by reason of unsafe structures, to the diminution of hazard of fire, or to the prevention of immoral displays, we find that the one ground upon which the town council may be thought to have acted is that the appearance of bill-boards is, or may be offensive to the sight of persons of refined taste. That the promotion of aesthetic or artistic considerations is a proper object of governmental care will probably not be disputed. <u>But, so far as we are advised, it has never been held that these considerations alone will justify, as an exercise of the police power, a radical restriction of the right of an owner of property to use his property in an ordinary and beneficial way.</u>"

We now come down to a determination of the instant matter. It does not appear as though purely aesthetic or artistic considerations, when they are the sole considerations, can be utilized in determining whether bill-boards come within the scope of the police power. If the right to erect or remove the bill-board is based upon aesthetic or artistic considerations alone, this Board has no right to interfere from the discretionary viewpoint. Thus, if the bill-board concern has made application for the right to construct a bill-board and has complied with all local ordinances and state laws, the permit granted to construct the bill-board cannot be revoked or changed in any respect by the Board of Permit

appeals. However, if the bill-board will be a nuisance or will be dangerous to drivers of vehicles as a result of shutting off a view, then the Board of Permit Appeals would have discretionary powers, because then the bill-board would be directly within the scope of the police power.

From what I have been able to learn of the proposed bill-board which has precipitated the instant query, it would seem that aesthetic and artistic considerations alone are involved. If this be so, and the bill-board concern has complied with all of the ordinances of the City and County and the laws of the State of California, the Board of Permit Appeals must, as a matter of law, grant the bill-board concern the right to construct the bill-board in accordance with the law.

Respectfully submitted,

CITY ATTORNEY

To the -
Board of Permit Appeals.

#3

May 23, 1935.

SUBJECT: Bond and Trust Fund Moneys of War Memorial.

Dear Sirs:

This office is in receipt of your request for an opinion as follows:

REQUEST

"At a meeting of the Board of Trustees held May 2, I was directed to ask your opinion with regard to the expenditure of certain funds under the control of this Board.

This Board received from the former Board of Trustees (the old private Board) in 1930 and 1931 some $780,000. which had been collected by the former Board from subscribers. Also some $200,000. worth of uncollected subscriptions were assigned to Pacific National Bank upon which subsequent payments have been received by this Board. These funds in the past were mingled with the 1927 War Memorial Bond Fund money for the purpose of constructing the War Memorial. There still remains in the City Treasury, some $40,000. of the Trust Fund money (the money collected from these subscriptions, or received from the old Board) and a few thousand dollars of the Bond Fund money. The Trust Fund money bears Appropriation No. 946; and the Bond Fund money bears Appropriation No. 84.901.33 and is set up for equipment. As the major part of construction and equipment of the project is completed the question has arisen as to whether these moneys may be used for certain purposes.

May the Trust Fund moneys be used for minor construction completions? That is for example, may it be used for landscape treatment of the War Memorial grounds? May it be used for construction of a movable orchestra pit in the Veterans' Building? May it be used for installation of a pipe organ in the Opera House? In general, may it be used for such items of construction as were originally omitted because of the fact that no expenditure for construction in excess of funds actually on hand could be made? May it be used to complete constructions and refinements of construction that were originally only partially provided?

May the Trust Fund or Bond Fund moneys be used for adding equipment found necessary or desirable since opening, such as: scenery sets, new stage equipment, new furnishings, etc.?

In all of the foregoing it is not intended to ask that any of these moneys be used for repairs or replacements of facilities worn out during operations of the War Memorial because it is conceded that expenditures for such purposes come from current fund appropriations.

The purpose in requesting this opinion is to define as near as possible the boundary line for expenditure of these "Construction" funds.

An early reply is requested as some matters will come before the next Board meeting on which your opinion will have a bearing."

OPINION.

It is evident from reading your request that the War Memorial consisting of the Veterans' Building and the Opera House, has not as yet been entirely completed although all of the major part of the construction work and the equipment has apparently been finished.

In as much as the Trust Fund and Bond Fund moneys were acquired for the very purposes for which you intend to use them, it is my opinion that such moneys may be utilized for the completion of the construction of the project and its equipment. Thus, all of the questions asked by you are answered in the affirmative.

Respectfully submitted,

CITY ATTORNEY.

To the -
Board of Trustees of the War Memorial.

#3

May 23, 1935.

SUBJECT: Power of the Retirement Board to Deduct Amounts of Contributions Without Consent of the Individuals.

Dear Sir:

This office is in receipt of your request for an opinion, as follows:

REQUEST

"There are certain teachers who have resigned from the School Department who have various amounts of accumulated contributions owing to them by the Retirement System. These teachers have been charged by the Board of Education for money owing to said board because of salary overpayments. The Board of Education has requested that said amounts be deducted from the money owing to said individuals by the Retirement System. Can this be done without the consent of the individuals themselves"?

OPINION

Section 22 of Ordinance No. 5561 (New Series), establishing the San Francisco City Employees Retirement System, reads as follows:

"The right of a person to a pension, an annuity or a retirement allowance, to the return of contributions, the pension, annuity or retirement allowance itself, any optional benefit, any other right accrued or accruing to any person under the provisions of this Ordinance and the moneys in the Fund created under this Ordinance shall not be subject to execution, garnishment, attachment, or any other process whatsoever, and shall be unassignable except as in this Ordinance specifically provided".

It appears from said section that even the "right to the return of contributions" is protected from garnishment, execution, attachment or other processes.

Thus it appears that under said ordinance, the Retirement System has no right to make such deductions without the consent of the individuals themselves.

Respectfully submitted,

CITY ATTORNEY

RALPH R. NELSON
Secretary-Actuary
Retirement Board

[illegible], 1[illegible].

[illegible]: [illegible] of the Bachelorette [illegible] is
[illegible] [illegible] of [illegible]
[illegible] [illegible] of the [illegible].

Dear Sir:

[illegible] letter is in [illegible] of [illegible] [illegible] [illegible], is
[illegible]:

[illegible]

"[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible]. [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible]

May 29, 1935.

SUBJECT: Withdrawal of Zoning Application
Filed with City Planning Commission.

Gentlemen:

This office is in receipt of your request for an opinion, as follows:

REQUEST

"A request for a re-zoning of certain property in the City and County was filed with the City Planning Commission. Notices were posted throughout the district and mailed to the property owners as provided by Ordinance.

"A hearing was held on the matter and the same taken under advisement by the Commission.

"While the matter is under advisement, the City Planning Commission received a letter of withdrawal from the applicant.

"Supplementing your opinion of April 5, 1934 regarding withdrawal, would you kindly give your opinion to the following queries:

"Query No. 1. Can the City Planning Commission allow the matter to be withdrawn after it has been taken under advisement?

"Query No. 2. Is it mandatory upon the City Planning Commission to allow the withdrawal upon request from the petitioner?"

OPINION

The opinion of this office rendered you on April 5, 1934 virtually answers both of your questions.

Using the same reasoning employed in the opinion rendered on April 5, 1934, I necessarily come to the conclusion that Query No. 1 should be answered in the affirmative, and Query No. 2 should be answered in the negative.

It is, therefore, my opinion that the City Planning Commission may allow the application to be withdrawn after it has been taken under advisement.

[illegible]

May 4th, 1966.

[illegible]: Establishment of Electric Installations
Final work after Electric Installations.

[illegible]

[illegible] This office is in receipt of your [illegible] from an applicant, in [illegible]

[illegible]

"I request [illegible] a [illegible] of electric [illegible] in the Clay and County area after the [illegible] Committee. Unless [illegible] immediately the [illegible] and notice to the property owners [illegible] by [illegible] means.

"I believe you [illegible] on this matter and [illegible] taken under [illegible] by the Committee.

"While [illegible] be quite satisfactory, the [illegible] Electric Commission requires a letter of [illegible] from the applicant.

"Accordingly [illegible] of Part 3, [illegible] regulations attached, would you kindly [illegible] the following questions:

"Clause No. 1. Can the City Electric Commission allow the notice in the [illegible] action in the last [illegible] under advisement?

"Clause No. 2. Is it mandatory upon the City Electric Commission to allow the [illegible] [illegible] the [illegible]?

[illegible]

The [illegible] of your [illegible] in Clause 2, [illegible] [illegible] under [illegible] of your [illegible].

[illegible] the [illegible] Commission to the [illegible] [illegible] Light Co. [illegible] [illegible] [illegible]

It is my opinion further that it is not mandatory upon the City Planning Commission to allow the withdrawal of a petition upon the request of the petitioner.

Respectfully,

CITY ATTORNEY

City Planning Commission
City Hall

May 31, 1935.

SUBJECT: Garbage Disposal,
San Francisco Sanitary Service Co.

Gentlemen:

This office is in receipt of your request for an opinion as follows:

Is the bid of the San Francisco Sanitary Service Company, which covers both collection and disposal, valid?

OPINION.

In view of the existence of the Garbage Collection Ordinance passed by the people on June 14th, 1927, and subsequently amended, I am of the opinion that the bid of this company is invalid since the granting of a franchise to this company would require a repeal of the Ordinance.

Respectfully submitted,

CITY ATTORNEY.

To the -
Honorable Board of Supervisors.

#3

June 10, 1935.

SUBJECT: In Re, Bids for Publication of Delinquent Tax List.

Dear Sirs:

You have asked that I advise you as to the power of the Board of Supervisors over the Publication of the Delinquent Tax List.

OPINION.

Section 3766 of the Political Code deals with the matter. The section reads as follows:

> "Publication of delinquent tax lists. The publication must be made once a week for three successive weeks in some newspaper of general circulation published in the county, and must be paid therefor at the county rate for advertising as fixed by the board of supervisors. If there be no newspaper of general circulation published in the county then said list must be posted in three public places in the county."

The Supreme Court has held that the Board of Supervisors may fix one rate for the publication of ordinary legal notices and another for the publication of the delinquent tax list. See:

DODGE, et al vs. KINGS COUNTY, 150 Cal. 96.

Since the advent of the present Charter it has been the practice of the Purchaser of Supplies to advertise for bids for thes particular work, and upon the bids being received, to report the bids to your Board, whereupon your Board would fix the rate at the lowest legal bid.

In view of the provisions of our Charter (Section 87) to the effect that the Purchaser of Supplies shall "enter into agreements for all contractual services required by the several departments and offices of the City, etc.", I believe the course adopted by the Purchaser in asking for bids for this particular work is proper for the reason that, while the State law vests the matter of the publication in the Tax Collector at the rate fixed by the Board of Supervisors, the machinery for obtaining bids has been modified by our Charter as above indicated.

In the recent case of

PEUTER vs. BOARD OF SUPERVISORS, 220 Cal. 314,

which dealt with the San Mateo County Charter, the Supreme Court held that a County Charter, adopted as provided by the Constitution, superseded the general law.

The same rule applies to a City and County Charter. This being the case it appears to me that the proper rule to follow would be to apply the charter procedure to the execution of the State law. In other words, to carry out the provisions of the State law regarding the publication of the delinquent tax list but to adopt the machinery provided by the Charter to do so and permit the Purchaser to make the contract at a rate of the lowest legal bid received, after your Board has fixed the rate at this figure.

I have this day advised the Purchaser that, in my opinion, the lowest bid received for the publication of the delinquent tax list does not comply with his specifications and that he is therefore justified in rejecting it. A copy of my communication to the Purchaser is attached hereto.

You also ask as to the necessity of publishing the delinquent list in a paper having the circulation required by the Charter. In 1933 I advised the Purchaser that this was a matter within his discretion and that, in taking bids for this particular publication, he had a wide discretion as to the character of circulation necessary to call to the attention of delinquent tax payers the fact that their taxes remained unpaid.

Respectfully submitted,

_____
CITY ATTORNEY.

To the -
Honorable Board of Supervisors.

#1

June 21, 1935.

SUBJECT: In Re, Use of Property under Jurisdiction of San Francisco Water Department by Police Department.

Dear Sirs:

I am in receipt of a copy of a Resolution of your Honorable Board reading as follows:

"Resolved, That the San Francisco Police Commission is hereby granted a permit to use the parcel of land on the north shore of Lake Merced, being 5.85 acres, more or less, as shown in City Engineer's survey entitled 'Proposed Police College and Training Grounds, Lake Merced Lands', dated June 1934, it being understood that the permission to use the land described shall be revocable at the will of this Commission. Revocation of permission to occupy the land shall be evidenced by a resolution passed by this Commission and a certified copy of the same served on the San Francisco Police Commission 90 days prior to the taking effect of the revocation of the permit.

"BE IT FURTHER RESOLVED, that such permit is granted subject to the following provisions:

1. That the Public Utilities Commission reserves a right of way for bridle paths through such 5.85 acres more or less, in a location satisfactory to the Public Utilities Commission; and

2. That no swimming shall be permitted, at any time, without permission first having been granted by the Public Utilities Commission.

"AND BE IT FURTHER RESOLVED, That a certified copy of this resolution be forwarded to the San Francisco Police Commission and upon that Commission duly adopting a resolution accepting the terms of the permit herein granted, shall be given the use and enjoyment of the above described land, situate in the City and County of San Francisco, State of California."

You ask if your Commission has authority to permit the property to be used for the purposes mentioned.

OPINION

I take it that the property in question is not needed for purposes in connection with the Water Department, and I especially note that the permit is revocable at the will of the Commission on ninety days notice to the Police Commission. It appears to me that two questions, pertinent to the present inquiry, present themselves:

First: Has the Commission the power to grant the permit?

Second: Is the purpose for which the premises are to be used a public purpose?

All property under the jurisdiction of the Water Department is actually owned by the City and County. Section 121 of the Charter provides that:

> "The public utilities commission shall have charge of the construction, management, supervision, maintenance, extension, operation and control of all public utilities or other properties owned, acquired, leased or constructed by the City and County for the purpose of supplying any public utility service to the City and County, etc."

The lands mentioned were acquired for the purpose of supplying the city with water, and while said lands may not be, at the moment, necessary for the purpose for which they were acquired, they remain under the jurisdiction of the Commission. It is a well settled principle of law that when property is acquired by a city for certain purposes, that fact does not deprive the city of power to use the premises for other public purposes where public necessity thereafter requires that its use be altered.

See: McQUILLIN MUNICIPAL CORPORATION Section 1229.

The text is sustained by the decisions.

See: CITY OF ARANSAS PASS v. MINTER (Tex.) 34 S.W.(2nd) 1113.

In this case the Court said:

> "A city has the inherent right and affirmative obligation to the public to put the property involved to whatever use may best serve the public interest, which is a matter to be determined by the city governing boards from time to time and administration to administration, unless it is permanently dedicated to a particular public use inconsistent with all other uses, and such dedication must be done under forms and solemnities essential to the

[illegible]

I have to say that the minority is resting on the demand for parking in downtown with the local merchants, and I wonder if there does that the minority is responsible or the fact is the demanding on street and parking on the right conditions. It appears to me that the conditions, contained in the general report, [illegible].

Flynn: Does the Commission the power to grant the permit?

Dwyer: It has power to grant the permit and is in the same a public purpose.

All the city area, the [illegible] of the street [illegible] the Director [illegible].

The public [illegible] [illegible] the [illegible], [illegible], [illegible], [illegible] [illegible] [illegible]

validity of such acts."

In the instant case no special dedication of the lands in question has ever taken place, nor was it the intention that the properties acquired from the Spring Valley Water Company should be held, irrespective of the fact that they might be no longer necessary, for use in connection with the development or distribution of water.

See: NEIL v. KANSAS CITY, et al, 188 S.W. 919.

This case dealt with the right of a city to permit a portion of property purchased for a public market to be used for a garage for police department automobiles. The Court said:

"Looking to the future growth of the market, defendant provided a larger establishment than the present demands of the special use required, and we perceive no good reason for the idea that a temporary use of an insignificant part of the property for a municipal purpose not inconsistent with, or detrimental to, the exercise and enjoyment by the public of full market rights and privileges, would constitute a misuse of the property, or be in excess of the proprietary rights the city acquired through the purchase of a fee-simple estate."

Also: PETTITT v. MAYOR, etc., OF CITY OF MACON, et al, (Geo.) 23 S.E. 198.

The Court said:

"In this case the property claimed to have been dedicated was vested, in the first instance, in the mayor and council of the city of Macon for public uses generally, and the mere appropriation by the public authorities of this public property to an indefinite public use is no such irrevocable abdication by the public authorities of all their power and control over the same as will prevent the subsequent appropriation of the same property to such other public uses as the interests of the public may thereafter require. After the ordinance was passed, the property was still held to the public use, and it is doubtful whether the mayor and council then in office would have the power by ordinance so to limit its control over the public property so held by it as to deprive it or its successors of the right thereafter to appropriate the property to some other use, which the interests and convenience of the general public might demand."

validity of such work.'

In the instant case no special indication of the trade in question has ever been made, nor may it be contended that the properties acquired from the public being rather proper would be said, irrespective of the fact that they are not in proper necessary, the use is conducive with the development of [illegible] of water.

See: [illegible] v. [illegible], et al., [illegible].

This case dealt with the right of a city to [illegible] a portion of property purchased for a public market to be used as a garage for public supervised vehicles. The Court said:

"Looking to the future growth of the market, [illegible] provides a larger establishment than the present demand of the special use requires, and we consider no [illegible] for the idea that a temporary use of an [illegible] part of the property for a municipal purpose not inconsistent with, or detrimental to, the [illegible] of the public of full market rights and privileges, would constitute a [illegible] of the property, or be in [illegible] of the proprietary rights the city acquired [illegible] a [illegible] [illegible]."

Also: [illegible] v. [illegible], [illegible] [illegible], et al., [illegible].

The Court said:

"In this case the property [illegible] to have been [illegible] was vested, in the first instance, in the [illegible] of the city of [illegible] the public [illegible], and the mere appropriation by the public [illegible] of this public property to [illegible] public [illegible] irrevocable abdication by the public [illegible] their power and control over the same [illegible] subsequent appropriation of the same property to [illegible] other public [illegible] as the interests of the public [illegible] thereafter [illegible]. After the [illegible] and [illegible], the property was still [illegible] for the public use, and it is [illegible] whether the [illegible] [illegible] the power by [illegible] to [illegible] the public property as [illegible] to be [illegible] to [illegible] of the right thereafter [illegible] the property [illegible] other use, which the [illegible] and [illegible] of the [illegible] public [illegible]."

It is therefore my opinion that it is permissible that the property in question may be used for some public use other than the one for which it was originally acquired. If the property were to be permanently ceded to the Police Department, the procedure provided for in Ordinance No. 12.1751, which deals with the transfer of unused property from one department to another, would have to be followed, but as the permit is revocable at the will of the Commission the instant case does not come within the purview of the ordinance.

This brings us to the second question - Is the purpose for which the premises are to be used a public purpose? The purpose,as stated, is for a "proposed Police College and Training Grounds".

The present Charter gives to the Board of Police Commissioners all the powers that it had under the old charter and therefore that body has the right to prescribe rules and regulations , discipline, etc., for the Department. This power would include the right to require a reasonable amount of training when, in the judgment of the Commission, such training is necessary for the efficient working of the Department.

Therefore, it would be within the province of the Board of Police Commissioners to provide a suitable place for said training and in so doing that body acts in a governmental capacity and any premises used for that purpose by the Police Commission is really being used by the City itself, and therefore the land is being used for a public purpose.

The question may be asked if the fact that the particular portion of the land, the use of which might be assigned to the Police Commission, would be accessible only to members of the police force, and not to the public generally, would have any bearing on the situation. The answer must be in the negative. The land is not set apart to the Police force or even to the Police Commission for private purposes, but rather for the purposes of accomplishing a public function.

Ordinarily, public funds or public property cannot be used for the conduct of a private affair, but the fact that an enterprise supported by public funds is not accessible to the public generally does not violate the constitutional provisions on the subject.

See: ALLIED ARCHITECTS' ASSN. v. PAYNE, 192 Cal. 431.

In this case the Supreme Court said:

"We do not think that it is necessary that the proposed Victory Hall should be open to the public generally

[illegible]

[illegible]

[illegible]

in order to bring its erection and maintenance within the meaning and designation of a public purpose. To permit the use of the hall by the people generally for general purposes would be to permit it to be used necessarily at times for something other than the promotion of patriotism. The obvious object of the use of the hall is to promote patriotism and when it has done that it has done all that is required. It is not necessary, nor, still keeping in mind the paramount purpose of its erection, desirable, that the scope of its use be enlarged to indefinite limits. The hall being dedicated to patriotic purposes it is but reasonable and right to say that in the promotion of that purpose its use and occupancy should be limited to those associations which are builded upon patriotism and perpetuated for the preachment of patriotism. Indeed, the legislature by its limitation of the use of the building to those who were joined as brothers in arms in defense of the nation conserves rather than detracts from the purpose for which it was erected."

I am therefore of the opinion that the permission granted to the Police Commission to occupy a portion of the property mentioned for the purposes indicated is reasonable, provided, of course, that the property in question is not necessary for the purposes for which it was acquired, to-wit, the production or distribution of water.

I do, however, direct your attention to the form of the resolution which you submit. It is revocable at the will of your Commission. I would suggest that it be definitely set forth in your resolution that upon the revocation of the permit, either that any improvements made under authority of the Police Commission shall remain the property of the City for the purposes of the water department or that they be removed without expense to your Commission.

Respectfully,

CITY ATTORNEY

PUBLIC UTILITIES COMMISSION

#1

June 24, 1935.

SUBJECT: In Re: Conduct of Garage near Private School.

Gentlemen:

I have your letter of June 17th wherein you direct my attention to the fact that at No. 1122 Sutter Street in a three story class "C" building there is conducted a school or college for the teaching of drugless medicine and emblaming and that there are about seventy pupils attending this school.

You also direct my attention to Ordinance No. 8564 which provides that:

> "No permit shall be granted to conduct, operate or maintain any public or commercial garage within the boundaries of two hundred feet of any school, church, theatre or hospital".

Opinion

Your inquiry necessitates the determination as to the meaning of the word "school" as used in Ordinance No. 8564, and as to whether the institution such as you mention in your communication comes within the definition of that term.

Ordinances restricting the use of property must be strictly construed and the prohibitions contained in the ordinance must not be extended beyond a fair and reasonable meaning of the language used, nor to accomplish purposes beyond those intended by the enacting body.

It must be presumed that the Board of Supervisors had in mind when it enacted the above mentioned ordinance certain hazards or dangers which would arise from the conduct of a public garage which would be more dangerous to those attending a school than to those occupying surrounding property and that any prohibitions contained in the ordinance were intended to safeguard those who might be subject to those dangers to a greater degree than would those in adjoining property which might be used for other purposes.

I think it may be taken as an admitted fact that the persons who might attend a school to perfect themselves in the learning of drugless medicine or in the art of emblaming are beyond the age of those who attend "schools", as that term is ordinarily understood.

Therefore, we must endeavor to ascertain the meaning of the word "school" as it is used in the above mentioned ordinance.

[illegible], 1970.

[illegible]. In the [illegible] of [illegible] [illegible]
[illegible].

[illegible]

[illegible]

[illegible]

When we take into consideration the particular class of persons who might be endangered by a public garage, or similar institution, naturally, our minds go to those who under ordinary conditions are not able to care for themselves, or who, by reason of their association at said school, are placed in any particular danger by reason of the conduct of the garage, or other institution, regulated by the ordinance. Necessarily the first that comes to our minds in regard to schools are the young and the immature who, by reason of their lack of age, are not able to realize danger and care for themselves under dangerous conditions.

In many cases lexicographers have placed a rather broad definition on the term "school" and have defined that term almost to mean any institution of learning, but when we take into consideration the reasons which actuated the prohibitions contained in the ordinance, I cannot bring myself to believe that it was intended that so broad a meaning should be given to the term. If it was, a private home in which a single pupil was instructed in any branch of learning, from the kindergarten class to the most advanced science, would come within the category of a "school".

Therefore, we must conclude that when the Board of Supervisors used the term "school" it used it as synonymous with schoolhouse or school building and intended to embrace only such places of instruction as were intended or used for the ordinary instruction of the youth of our country and did not intend that a building, part of a building, home or part of a home, where someone might impart knowledge or learning to another, would be looked upon as a schoolhouse or school building.

I believe the rule is well stated by the Supreme Court of Arizona in the case of ALEXANDER v. PHILLIPS, 259 Pac. 1056, where the court said:

> "A schoolhouse is any building which is appropriated for use prescribed or permitted by the law to public schools."

Therefore, in my opinion, the meaning which should be given to the term "school", as used in the ordinance above mentioned, is that the terms "school" or schoolhouse" should mean a building, or a part of a building, wherein instruction is given along the lines provided for in General Laws of California.

So far as I have been able to ascertain, while the teaching of drugless medicine and embalming is encouraged by the State in the appointment of commissions to supervise these particular subjects, they are no part of the curriculum provided by the educational system of the State and, therefore, a building that is used for

the teaching of these arts or sciences does not come within the prohibition mentioned in the section.

Necessarily the term "school" is not limited to those institutions which are conducted directly by the State but it will be applied to all institutions that are providing a general course of education which will satisfy the mandates for education which the State law provides.

You are, therefore, advised that in my opinion the premises at 1122 Sutter Street, described in your communication, do not constitute such a "school" as will prevent the establishment of a public garage within two hundred feet thereof.

Respectfully,

CITY ATTORNEY

CHIEF ENGINEER
FIRE DEPARTMENT

#1

June 24, 1935.

SUBJECT: In Re: Distribution of Advertising Matter under Ordinance No. 11.0011.

Gentlemen:

I am in receipt of your letter under date of June 20, 1935, reading as follows:

"We respectfully request an opinion from you upon the following matter, and are enclosing herewith a communication from the Associated Food Stores with a list of their members and an advertising circular distributed by their members.

"What we would like to be advised upon is whether or not the members of the Associated Food Stores can have distributed by their employees these circulars under the permit issued to the Associated Food Stores pursuant to the provisions of Ordinance No. 11.0011 "Regulating the Distribution of Advertising Matter," or whether or not it will require a separate permit for each store operated by its members?

"We understand that the manner in which these circulars are distributed is that they are furnished to the respective markets by the Association and distributed by the clerks or employees thereof, and we desire to call your attention particularly to the language of Section 3 of the said ordinance."

Attached to your letter to me is a letter addressed to your Secretary by the San Francisco Grocery Company, which reads as follows:

"In reference to our conversation of yesterday I am enclosing a list of the members of The San Francisco Grocery Company, advertising under the name of the Associated Food Stores.

"The San Francisco Grocery Company is a 100% cooperative organization, in other words the names on the list are the owners of this organization.

"We have taken out a Distributor's Permit No. 17 for those of our members who wish to do their own distribution.

"Due to the fact that the members own our organization I would like to know if they can do their own

Mr. Ed. Tomb.

Subject: Re Gen. Electrodynamics of Advertising
Service Under Consideration Co.
L.O.U.

Gentlemen:

I am in receipt of your letter dated July 2, 1924, enclosing an invoice

"The responsibility assumed on behalf of your company when the following matter, and are entitled to receive, a copy of their accounts that an authorized standard monthly by their accounts.

"That we would like to be advised when to service or not the tendency of the industrial load during the time distributed by their accounts. These circumstances which the period issued to the industrial load circuit connected to the operations of customers in. 1. 1921 "Applicant for distribution of electricity below." We whether or not it will provide a circuit would for such above industrial or its use consumer?

"The consumption load has reports to allow items circuits are distributed in such they are included in the percentage accounts in the accounting and distribution and by the items or percentage charge, and we should to cost their allowance particularly to the purpose of certain of the main circuits."

Attached is your letter to me in a letter advertisement to your Industrial by the Gen Electric Company, which result as follows

"In reference to our conversation of yesterday I am enclosing a list of the members of the Gen Electric Company, advertising under the name of the Lamp-Label Food Income.

"The Gen Electric Company company is a list accountants organization, in these books the names of the list are the names of this organization.

"We have taken out a [illegible] in, if for those of our members who wish to be also use distribution.

"The is the fact that the company can not [illegible] limitation I would like to have it [illegible] not [illegible] use

distribution under our Permit No. 17."

OPINION

It appears from the letter of The San Francisco Grocery Company that Associated Food Stores is not directly conducting the business of dealing in foodstuffs, but is an association of various store owners who deal in such commodities and that the Associated Food Stores has taken out a permit for the distribution of advertising matter as provided in Ordinance No. 11.0011 and furnishes the advertising matter to the various stores which are members of the Association and the stores themselves make the distribution thereof.

Section 3 of the ordinance provides that it shall be unlawful for any person, firm or corporation, except the holder of a distributor's permit, to distribute, or cause to be distributed by employees or otherwise, any advertising matter mentioned in the ordinance.

From the communications above set forth, it would appear that the advertising matter is prepared by the Association and is then given to each individual store owner to distribute in his own locality.

It therefore appears to me that the matter of the preparation of the advertising matter is not important, but before the matter can be distributed the distributor must have a permit.

This view is strengthened by the proviso contained in Section 7 of the Ordinance which permits any person to advertise his own business without the payment of the license fee required by the Ordinance, provided said person is the holder of a distributor's permit and the quantity of advertising matter does not exceed ten thousand copies in any one day.

With this proviso in view, it appears to me that it was the clear intention of those who framed the Ordinance to compel every person distributing advertising matter to have a distributor's permit, but to require the license only from those who made distribution on behalf of others.

In the instant case, if the fifty or more members of the Association could distribute under one permit, there would be no opportunity of determining which particular individual might be violating the terms of the Ordinance by distributing advertising matter contrary to the provisions thereof, for the reason that all of the advertising matter would bear the same permit number and would be distributed by various individuals.

[illegible]

[illegible]

You are therefore advised in the instant case there are two courses which you may pursue, one is to compel each store owner to obtain a permit and when he obtains his permit he may make the distribution of advertising matter which advertises his own business without the necessity of pay a license, but all such advertising matter should have attached thereto the particular permit number of the individual store owner, and the other course is to permit the Associated Food Stores to distribute all the advertising and require from this Association the distributor's permit provided in Section 3 and the license provided in Section 7. In this way the Association will be held directly responsible for any violation of the Ordinance.

As per your request, I am returning you the communications and exhibits attached to your letter.

Respectfully,

CITY ATTORNEY

THE BOARD OF POLICE COMMISSIONERS
Hall of Justice

June 25,1935.

Subject: Withdrawal of Application for Zoning after Decision by Commission.

Dear Sirs:

I am in receipt of your communication reading as follows:

"On June 10,1935, by resolution, a request for re-zoning was denied by the Commission. Applicant was notified of said action by mail in accordance with the Procedure Ordinance.

At a subsequent meeting the applicant appeared before the Commission, and requested that the resolution of denial be rescinded, and that he be allowed to file a request for withdrawal of the application.

QUERY

Can the City Planning Commission,after denying an application for re-zoning,rescind their action and allow the withdrawal of the same?

OPINION

When a person files an application for re-zoning of any property and the requested notice is given to surrounding property owners the machinery authorizing the re-zoning of the property by the Commission is set in motion and the Commission has jurisdiction to proceed in the matter and determine whether the property should or should not be re-zoned. The Commission having jurisdiction over the matter and having proceeded to give consideration to the application for re-zoning and having determined the matter in accordance with the facts presented and announced their decision there is nothing further left for the Commission to do and it has thereafter lost jurisdiction except when a new application may be filed in accordance with the provisions of the Charter and the Zoning Ordinance.

Section 117 of the Charter provides:

"That in case of disapproval by the commission or by the supervisors on appeal of a proposed change, such proposed change may not be resubmitted to or reconsidered by the commission for at least one year."

[illegible] 21,1[illegible]

[illegible]: [illegible] of qualifications for
[illegible] after [illegible] or [illegible].

[illegible] Sirs:

I am in receipt of your [illegible] [illegible] as follows:

> "On June 20,1[illegible], by resolution, a [illegible] the [illegible] was [illegible] to the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible].
>
> In a [illegible] [illegible] the [illegible] [illegible] [illegible] [illegible], [illegible] [illegible] that the [illegible] of [illegible] be [illegible], and [illegible] is [illegible] a [illegible] [illegible] of the [illegible].
>
> [illegible]
>
> [illegible] the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

The purpose of this provision of the Charter was undoubtedly to prevent applicants from renewing applications for re-zoning, when under ordinary conditions there could be no change in the facts upon which the Commission acted. If an applicant was permitted to withdraw his application after the Commission had denied it he could renew it at once and the same hearing would again have to be gone through and so on without end.

You are advised therefore, that when the Planning Commission has denied an application for re-zoning the only procedure left open to said applicant, if he is dissatisfied with the ruling of the Commission, is to appeal to the Board of Supervisors as provided in the Charter and in the Zoning Ordinance. So far as the application made to the Commission is concerned it has been disposed of and there is nothing left to be done.

Respectfully,

City Attorney.

CITY PLANNING COMMISSION.

The purpose of this provision is to remove the anomalous to treated applicants from Possible applicants for municipal some water supplies could also wish to change in the facts upon which the Tribunal acted. If a solicitor who wrongly to withdraw his application after the tribunal had ruled it be would have to pay the same fee the same solicitor would have to pay if he had not withdrawn.

The new Rating Legislation, and also the Planning Legislation has helped to simplify the procedure by not requiring the fee to be paid applications. It is to be distributed with the notice of the tribunal. In a report to the Board of Superintendent is involved in the district and in the Public Interest. In the application made by the Planning or in proceedings it has been thought and this is another left to be done.

Mr. Chairman.

Sir, Chairman.

CITY PLANNING OFFICER.

June 26, 1935

SUBJECT: In re effect of State law on conduct of Public Pound in San Francisco.

Dear Sir:

I have your letter under date of June 22nd, reading as follows:

"We wish to be informed as to whether the following provision of Chapter 266 of the laws of 1935 is applicable to the City and County of San Francisco:

'Chapter 266

An act to amend section 4041.11 of the Political Code, relating to powers and duties of boards of supervisors.

Section 1. Section 4041.11 of the Political Code is hereby amended to read as follows:

4041.11. (1) Under such limitations and restrictions as are prescribed by law, and in addition to jurisdiction and powers otherwise conferred, the boards of supervisors, in their respective counties, shall have the jurisdiction and powers to maintain, regulate and govern public pounds, fix the limits within which animals shall not run at large, and appoint poundkeepers, who shall be paid out of the fines imposed and collected from the owners of impounded animals, and from no other source.'"

OPINION

Ordinarily general state laws applicable to counties do not affect a city and county operating under a Freeholders' charter. See Kahn v Sutro 114 Cal. 316; Rocca v.Boyle 166 Cal. 94.

While our present charter is silent as to the organization of a public pound or the regulation thereof, I believe it is one of those matters that has carried over from the old charter. Subdivision 8 of Section 1, Chapter II Article 2 of the old charter gave to the Board of Supervisors the right to provide a public pound and to make all necessary rules and regulations in the matter of animals running at large and for the custody and destruction of the same. Under the authority of this provision of the old charter, the Board of Supervisors from time to time enacted ordinances providing for a public pound and regulating its conduct. Section 2 of our present charter

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

I have [illegible] [illegible] of [illegible] [illegible], [illegible] [illegible]

"[illegible] [illegible] [illegible] [

continues all ordinances which were in force at the time the latter charter took effect unless they were inconsistent with its provisions. As the present charter contains no provision regarding a public pound it cannot be said that there is any inconsistency in the existing ordinance. Furthermore, another paragraph in Section 2 of the present charter provides that -

> "All functions of the city and county, and the powers and duties of officers and employees charged with the performance therefor, as those shall have been apportioned among departments and offices, and institutions, utilities, bureaus or other subdivisions thereof, as existing at the time this charter shall go into effect, shall continue to be the functions of such departments and offices and the powers and duties of officers and employees assigned thereto, except as in, or under authority of, this charter otherwise specifically provided."

Therefore, if under the provisions of the superseded charter, the Board of Supervisors had the right to provide for, and regulate a public pound, that authority has been continued by the present charter.

Section 3 of the present charter provides -

> "Where a procedure for the exercising of any rights or powers belonging to a city, or a county, or a city and county is provided by statute of the State of California, said procedure shall control and be followed unless a different procedure is provided in, or by ordinance enacted under authority of, this charter."

It is evident from the provisions of this section that where authority is given to the Board of Supervisors to regulate by ordinance a matter which may be also subject to state regulation, that the regulation by ordinance shall prevail over the state law.

You are therefore advised that in the matter of regulation of a public pound, Section 4041.11 of the Political Code does not apply where it conflicts with any ordinance regulating the public pound.

Yours very truly,

City Attorney

To -
Hon. Leonard S. Leavy,
Controller

[illegible]

[illegible]

[illegible]

June 28, 1935.

SUBJECT: Section 3881a, Political Code, as to Cancellation and Transfer of Tax Credit on Wrong Property Requires Ascertainment of a too General Thing. No Obligation on Tax Collector.

Dear Sir:

On the twentieth of this month you requested my opinion in reference to the obligation upon your office in cancelling the credit of tax paid on the wrong property and transferring the same to the property intended by the taxpayer, particularly in view of the provisions of Section 3881a of the Political Code.

The specific language therein which gives you concern is "if no guaranty or certificate of title has issued respecting the property since the payment was credited." You seek information how and by whom it is to be ascertained if such guaranty or certificate of title has issued.

OPINION

The statement in the Political Code at section 3881a, in the fourth paragraph reads as follows:

> "Tax payments: mistake. If a property owner by mistake pays the tax on other property than the one intended and by substantial evidence convinces the county or city and county tax collector that the payment was intended as payment of taxes on another property, and if no guaranty or certificate of title has issued respecting the property since the payment was credited, a cancellation of the credit and transfer thereof to the property intended may be made by the tax collector; provided, that the owner of the property from which the credit is to be removed shall be notified by the tax collector by registered mail at his last known address respecting such change."

The foregoing indicates that two things must be determined by the tax collector before authority for cancellation and transfer of tax credit vests in him, namely, the existence of a mistake as to the property upon which the tax was paid, and secondly, the nonexistence of a guaranty or certificate of title on the property since the tax payment was credited thereon.

[illegible]

[illegible]

[illegible]

The first requisite is comparably simple of fulfillment, but the second is of such a character that positive performance is impossible. The reason for this is that numerous persons, firms or corporations can give guarantees or certificates of title and the tax collector has no means of knowledge concerning such action.

In view of such circumstances, no duty rests upon the tax collector to effectuate the purposes of the Act in question until such officer is satisfied as to the requirements of the legislation, and one of them being of an indefinite nature no obligation is imposed upon him.

Therefore, action in this respect by you would be entirely voluntary and if any liability should arise because of it the same would be for your personal account, and you are so advised.

Respectfully,

CITY ATTORNEY

Tax Collector

#7

July 1, 1935.

SUBJECT: In re: Gasoline Supply Station Ordinances.

Dear Sirs:

You have submitted to me a proposed ordinance dealing with the above mentioned subject matter, and ask if the fact that Ordinance No. 8564 (New Series), regulating the location, construction and conduct of public garages, provides a lesser distance from schools, churches and theatres within which a garage may be maintained, than does the proposed supply station ordinance, renders the latter void upon the ground of unjust discrimination between similar classes of business.

OPINION

In the ordinance submitted it is provided that the distances within which the supply station may not be maintained shall be measured from the exterior boundaries of the lot on which the station is to be erected to the exterior boundaries on which the hospital, church, school or theatre is situated, while in the garage ordinance the measurements are to be made from the entrance of the garage building to the entrance of the hospital, school, church or theatre, except that in no case shall a garage be erected within fifty feet of the exterior boundaries of any school, church, hospital or theatre. It requires no mathematical calculation to determine that the regulations as to distance are more stringent in the supply station ordinance.

Section 21 of Article I of the Constitution of California provides:

> "No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislature, nor shall any citizen or class of citizens be granted privileges or immunities, which upon the same terms may not be granted to all citizens."

The textwriters have laid down the following rule on the subject:

> "Statutes and ordinances in which attempts have been made to discriminate in favor of, or against particular persons, or classes of persons, as to whom no reasonable basis of discrimination can be said to exist, are uniformly held to be void."

See: CAL. JURIS., Vol. 18, p. 826.

[illegible] 3, 1880.

[illegible]: in re: Dwelling Length Charles [illegible]
Defendants.

[illegible] Court:

The [illegible] complained in the [illegible] [illegible] [illegible]

The text is sustained by the decisions.

See: In Re GASTIOS, 95 Cal. App. 762.

> "In enacting police regulations pursuant to the authority given by Section 11 of Article XI of the Constitution, a city may not make an arbitrary classification of different persons or classes of persons unless some reasonable basis of discrimination exists.

See also: In re ROBINSON, 68 Cal. App. 744, in which case the court in construing the constitutional provision above quoted said:

> "This latter section of the constitution has been given direct application to statutes and ordinances which have been enacted and sought to be enforced either by the state or by political subdivisions thereof, and in which attempts have been made to discriminate in favor of or against particular persons or classes of persons as to whom no reasonable basis of discrimination can be seen to exist; and in such cases the courts of this state have uniformly held such attempted legislation to be void."

However, it is not every ordinance which seems to discriminate between classes of persons similarly situated that have been declared void by the courts, and where there is any reason for the discrimination between classes, it has been sustained.

On this subject the District Court of Appeal in RITZ v. LIGHTSTON, 10 Cal. App. 685, said:

> "As to whether or not the matter in any particular case is a police regulation, or a proper classification, must be left to a great extent to the judgment of the law-making power of the city. It is only in unusual cases that the courts interfere with the discretion of such law-making power."

With these principles in view, consideration should be given to the particular evil or danger to be controlled or regulated by the ordinance in the instant case. The owner of a lot to be used as a service station has the same right to make use of his lot for that purpose as has the owner of a lot who desires to maintain a garage upon it, and with no more restrictions upon the use of the lot than are placed upon the garage, unless the service station is more dangerous to the public welfare than is the garage.

Therefore, it is your duty to give consideration to the particular evil or danger that you are attempting, or have attempted, to regulate by each particular ordinance, and if the dangers or hazards attendant upon the conduct of a service station are not greater than those attendant upon the conduct of a garage, then reg-

The book is dedicated to Mr. Gorbachev.

Dear Mr. Gorbachev, it is not, you see, that

"the executive policy regulations imposed by the authority given by section 21 of chapter 12 of the constitution, I duly, you see, as a result of the situation of difficult issues in states of emergency, [illegible] [illegible] [illegible]

ulations or prohibitions more stingent on one than on the other should not be adopted. It is, however, up to your board to determine this fact and then to act accordingly.

It is difficult to find a case which deals directly with the subject which you have before you.

In the case of EQUI v. CITY AND COUNTY OF SAN FRANCISCO, decided by our Superior Court, in which case the validity of the license tax on service stations was under consideration, Judge Johnson adverted to the fact that the testimony showed that the fire hazard was greater in a garage than in a service station, and unless there was some other reason for having a higher tax on service stations than on garages, the discrimination in favor of the latter would not be sustained.

In a case very similar to the instant one, the Supreme Court of Idaho in CONTINENTAL OIL CO. v. TWIN FALLS, 286 Pac. 354, said:

> "Said ordinance No. 322 is invalid, for the further reason that it is discriminatory, in that it does not apply to all businesses of the same class. Upon its face, the ordinance is designed to regulate the construction, maintenance, and operation of gasoline service stations of the drive-in type only. If it is intended to regulate the sale of gasoline as a 'dangerous' or 'obnoxious' business, under C. S. sec. 3954, its provisions do not cover garages, stores, or other places where gasoline is retailed by means of a curb pump, and the customer does not drive across the sidewalk. See City of Vincennes v. Marland Refining Co. (C. C. A.) 33 F. (2d) 427. If the object sought releates to the regulation of driving vehicles across the sidewalk, authorized by C. S. sec. 3962, it clearly discriminates in favor of those businesses whose patrons drive across the sidewalks to their place of business, such as garages, drive-in refreshment stands, etc. The municipality has the right to classify businesses, but in so doing it will not be permitted to make an 'arbitrary distinction between different kinds and classes of business,' where the conditions are similar."

In BOCCI v. TOWN OF LANDSDALE, 208 Cal. 720, the Supreme Court of this state held that an ordinance prohibiting stonecutting works or monument yards from keeping open on Sunday, and permitting cemeteries, crematories, floral stands, etc. to keep open and to operate on Sunday, was void, in that the classification is not made on some natural, intrinsic or constitutional distinction between the enterprises.

You are, therefore, advised that you should give particular attention to the dangers or hazards incident both to the conduct of

public or commercial garages, as well as to those incident to the conduct of service stations, and unless the evidence shows that the conduct of the service station entails a greater danger or hazard upon those attending schools, churches, hospitals or theatres, than does the garage, there should be no more stringent regulations on service stations than on garages.

Respectfully,

CITY ATTORNEY

BOARD OF SUPERVISORS

#1

July 8, 1935.

SUBJECT: In re - Amendment of Ordinance
Granting Trackless Trolleys
Permit to Market Street
Railway Company.

Dear Sir:

I have before me your letter asking if it is possible to offer amendments to proposed ordinance No. 15.09110, which said ordinance amends Section 2 of Ordinance No. 15.0914 granting permission to Market Street Railway Company to operate a trackless trolley over its Eighteenth Street line, the two amendments which you desire to offer being as follows:

> "Sufficient buses shall be operated to maintain an eight (8) minute headway from 8 a. m. to 1 a. m. daily between terminals as described in Section 1 hereof; and from 6 a. m. until 9 a. m. and from 4 p. m. to 7 p. m. there shall be maintained five (5) minute headway between said terminals."

> "Every bus, while carrying passengers, shall be in charge of a motorman and conductor, and it shall be unlawful to operate each bus with only one man."

OPINION

While Ordinance No. 15.0914 enacted July 9, 1934, purports to grant to the Market Street Railway Company a permit to extend its service pursuant to Section 132 of the charter, it is really an ordinance granting permission to the Company to abandon its street car service and to substitute therefor a trolley bus service, which change necessitated operation on certain streets which were not included in the operating permit held by the Company.

A permit to extend service on streets not included in the original franchise or operating permit must be granted on the same terms and conditions as govern the operation of the line from which the extension is made.

Therefore, if Ordinance No. 15.0914 was solely an ordinance permitting an extension of service over streets not included in the original permit, conditions which were not in the original permit could not be written into it, but as the ordinance mentioned is an ordinance permitting the substitution of a new service for an existing one, the same rule does not apply, and it was proper in enacting the original ordinance substituting the trackless trolley for the street car to include such conditions as the Board of Supervisors

July 9, 1966.

Subject: Re gr - Amendment of Definitions
Governing Investment Institutions
Pursuant to Section 12(a)(4)
Banking Commission.

Dear Sir:

I have before me your letter asking if I am in agreement on either amendments to proposed regulations Nos. 12.0010, which deal with Income Growth Investment S of Definitions No. 12.0010 (Investing Institutions Market Interest Rating Commission) to provide a transitional training period like Diplomatic Issues Item, but the amendments which you propose to either Indian or Filipino

"Qualified Issuer shall be interpreted to include an eligible (10) months Banking Item 2 e. or, in 1 e. or, Indian between institutes as mentioned in section 1 Income, and Item 2 e. or, with 2 e., or, and Item 2 e. or, in 2 e. where shall be qualified from (1) months Banking Income and Institutes."

"Issue Bank, while satisfying requirements, shall be in charge of a national and authorized, and it shall be authorized to operate such and with only one."

Sincerely,

Notice Commission Re. 12.0010 amended July 9, 1966, proposes to grant to the Indian Income Institutes Commission a period to obtain its service provided in section 100 of the statute, in it satisfy in such manner qualifying certificates on the Income in accordance the income services and to operations Bureaus a limited time authority, which manage commissioned counsel to qualified officers which does not the needed to the operating counsel held by the commission.

I refuse to amend section to authority not included in the qualified Commission or operating period shall be granted to the same issue and qualifications to grant the expansion of the time from which the authority is made.

Therefore, in Section Re. 12.0010 the period of operations qualifying on authorized or service under authority not included in the qualified period. qualifying which make the in the original period would not be satisfied into it, but as the authorized authorized is or qualifications qualifying the authorizations of a new authorization or authorized one, the same with does not qualify, and it was proper to qualify this original authorized authorized the Commission limiting the authorized authorized as the count of Commission

might deem proper to assure adequate service to the public.

This being the case, the same rule must apply to the amendment of this ordinance, and such amendments as may in the judgment of the Board be necessary to afford adequate service to the public are in order.

Should the amendments which you have submitted to me be allowed the title of the pending ordinance should be amended accordingly.

Yours very truly,

CITY ATTORNEY

JAMES B. McSHEEHY,
President,
Board of Supervisors.

#1

July 13, 1935.

SUBJECT: In Re, Compensation of Election Officers for Special State Election, August 13, 1935.

Dear Sirs:

I have before me a copy of a proposed Resolution submitted to your Board appropriating $5,000.00 to defray additional costs of a special election called by Senate Bill No. 1118. There is a difference in compensation for election officers as fixed by Annual Salary Ordinance of the City and County of San Francisco and Senate Bill No. 1118 above mentioned, which is now effective by reason of its approval by the Governor, and you ask whether the State law or the Salary Ordinance is effective in the premises.

OPINION.

The bill mentioned submits to the electors certain amendments to the Constitution of the State of California and for the purpose of approving or disapproving said amendments calls a special election to be held on August 13, 1935. It also limits the number of election officers who shall conduct said election and fixes the compensation of said election officers at an amount not to exceed three dollars per day. The annual salary ordinance of the City and County fixes the compensation of said election officers at five dollars per day and therefore the question arises as to whether you may legally make provision for the payment of the higher amount.

While the election called is undoubtedly an election for State purposes, those charged with the responsibility of conducting it in San Francisco will be officials and employees of, and will be paid by, the City and County. Section 8½ of Article XI of the State Constitution gives plenary power to the framers of a charter to provide "the method by which, the times at which and the terms for which the several county and municipal officers and employees whose compensation is paid by said City and County, shall be elected or appointed, and for their recall and removal, and for their compensation. * * * *"

In exercising the power conferred by this provision of the Constitution the framers of our present Charter gave to the Board of Supervisors full power to fix the compensation of all officers and employees whose compensation was not fixed by the Charter itself. (Charter Section 73.)

[illegible] 24, [illegible]

[illegible] Sir Ian, [illegible] of
Electric Industry Inc
[illegible]
[illegible] St., [illegible]

Dear Sir:

[illegible]

[illegible]

[illegible]

In the exercise of the authority so conferred the Board, by the adoption of the Annual Salary Ordinance, fixed the compensation of election officers at five dollars per day. (See Ordinance No. 9.05367.)

Section 3 of the Charter provides:

"Where a procedure for the exercising of any rights or powers belonging to a city, or a county, or a city and county is provided by statute of the state of California, said procedure shall control and be followed unless a different procedure is provided in, or by ordinance enacted under authority of this charter."

As already stated, the Salary Ordinance was enacted under the authority of Section 73 of the Charter. An ordinance enacted under the authority of a charter provision has all of the effect of a charter provision. See HARRISON vs. HORTON, 5 Cal.App. 417. Furthermore, Section 3 above quoted makes an ordinance adopted under authority of the Charter prevail over the State law.

You are therefore advised that the salary ordinance supersedes the State law on the subject, and that in making provision for the expense of the coming election the compensation of election officers be fixed at five dollars per day.

To accomplish this end you need not especially direct the payment of said five dollars per day for this has already been done by the Salary Ordinance. However, to the end that the Registrar of Voters and the Controller may be fully advised in the premises I suggest that Resolution No. 2034 now pending before you be amended by adding the following paragraph:

"Further Resolved thatthe compensation of all election officers conducting the above mentioned election be at the rates fixed therefor in the Annual Salary Ordinance for the year 1935-1936.

Respectfully submitted,

CITY ATTORNEY.

To the -
Board of Supervisors.
Copy to -
Controller
Registrar.

[illegible]

In the exercise of his authority to [illegible] the [illegible] by the activities of the [illegible] Commission, first his activities [illegible] [illegible] [illegible] Sec. 9, [illegible].)

Section 3 is the Central provision:

"There is established for the administration of this chapter [illegible] or power authorized by [illegible], or in part, by another [illegible] or function of the Commission, [illegible] shall constitute and be [illegible] a [illegible] [illegible] [illegible]

July 13, 1935.

SUBJECT: In re: Hearings by Board of Supervisors
Sitting as a Board of Equalization

Gentlemen:

I have your letter under this date reading as follows:

"Supervisor Havenner, through the Board of Supervisors sitting as a Board of Equalization, requests your immediate opinion on the following:

"Is the Board obligated to grant the demand of a petitioner that the hearings by the Board of Equalization be continued, and, further, that the petitioner have the privilege of cross examination of the Board of Appraisers appointed to assist the Board of Equalization? Also, to cross examine the Assessor as to their reason for not granting reduction and the basis on which they make their findings?"

OPINION

The Board of Supervisors, while sitting as a Board of Equalization, exercises judicial functions and its decision as to the value of the property and the fairness of the assessment, so far as the amount is concerned, constitutes an independent and conclusive judgment of the tribunal created by law for the determination of that question. See LOS ANGELES GAS & ELECTRIC CO. v. LOS ANGELES, 162 Cal. 64.

This being the case, there is vested in the Board of Supervisors a large discretion as to the continuation of hearings and also as to the time which shall be given to the various applicants for the reduction of assessments, and if the Board has given an applicant an opportunity to present his case, there is nothing in the law which requires that any number of witnesses shall be heard, and if the applicant has the opportunity of presenting the facts on which he bases his application, that is all that he is entitled to, and when this has been done, the Board is justified in declining to permit the hearing to proceed further. On this subject I direct your attention to Section 3676 of the Political Code reading as follows:

"Upon the hearing of the application the board may subpoena such witnesses, hear and take such evidence in relation to the subject pending as in its discretion it may deem proper."

[illegible]

[illegible], 1955.

[illegible] Re: Hearings by Board of Supervisors Sitting as a Board of Equalization

Gentlemen:

I have your letter under this date reading as follows:

"Supervisor Devender, through the Board of Supervisors sitting as a Board of Equalization, requests your immediate opinion on the following:

"Is the Board obligated to grant the demand of a petitioner that the hearings by the Board of Equalization be continued, and, further, that the petitioner have the privilege of cross-examination of the Board of Appraisers appointed to assist the Board of Equalization? Also, to cross-examine the assessor at its [illegible] for not granting reduction and the basis on which they make their findings?"

[illegible]

The Board of Supervisors, while sitting as a Board of Equalization, exercises judicial functions and its decision as to the value of the property and the fairness of the assessment, so far as the amount is concerned, constitutes an independent and conclusive judgment of the tribunal created by law for the determination of that question. See [illegible] 1955, 1957 [illegible].

This being the case, there is reached in the Board of Supervisors a large discretion as to the continuation of hearings and also as to the time which shall be given to the various [illegible] for the reduction of assessments, and if the Board has given an applicant an opportunity to present his case, there is [illegible] in the law which requires that any number of witnesses shall be heard, and if the applicant has the opportunity of presenting his facts on which he bases his application, that is all that he is entitled to, and when this has been done, the Board is justified in declining to permit the hearing to proceed further. On this subject I [illegible] your attention to Section 3078 of the Political Code reading as follows:

"Upon the hearing of the application the board may [illegible] such witnesses, hear and take such evidence in relation to the subject [illegible] as to the [illegible] it may deem proper."

From this language there can be no doubt that the Board is the judge as to the amount of evidence which it desires to hear relative to any pending application, and unless there is an absolute abuse of discretion, the action of the Board is binding on the applicant.

As to the question which you ask relative to the right of the applicant to cross examine the Board of Appraisers appointed to assist your Board inequalizing assessments, you are advised that this is also a matter entirely discretionary with your Board, and if you believe that those appointed by you have made a full and fair statement as to the value of the property, the matter of cross-examination by the applicant, as I have said, is entirely discretionary.

As to the continuance of hearings, this also is a matter of discretion with your Board. Section 3672 of the Political Code provides for the meeting of the board of supervisors of each county as a board of equalization on the first Monday in July of each year and that it must continue in session for the purpose of equalizing assessments until this particular business is disposed of, but not later than the third Monday in July. Section 3705 of the Political Code gives to the Btate Board of Equalization the power to extend for a period not exceeding twenty days for the equalization of assessments by the county board.

However, as I have said, the law is not mandatory upon you in this regard and you have a perfect right to conclude your proceedings as a board of equalization when all applicants have been heard and you are the judges as to the proper time to allow to each applicant and when acting upon evidence presented to you, either by the applicant or by other witnesses, you have determined whether or not an assessment should be raised or lowered, your action is conclusive and binding upon the applicant, as well as upon the Assessor.

Respectfully submitted,

_____

CITY ATTORNEY

BOARD OF SUPERVISORS

From this language there can be no doubt that the Board is the judge as to the amount of evidence which it desires to hear relative to any pending application, and unless there is an absolute abuse of discretion, the action of the Board is binding on the applicant.

As to the question which you had relative to the right of the applicant to cross examine the Board of Appeals appointed to assist your Board (Appellating Assessments), you are advised that this is also a matter entirely discretionary with your Board, and if you believe that those appointed by you have made a full and fair statement as to the value of the property, the matter of cross-examination by the applicant, as I have said, is entirely discretionary.

As to the continuance of Meetings, this case is a matter of discretion with your Board. Section 6013 of the Political Code provides for the meeting of the board of supervisors of each county as a board of equalization on the first Monday in July as such year and that it must continue in session for the purpose of equalizing assessments until this particular business is disposed of, but not later than the third Monday in July. Section 6015 of the Political Code gives to the State Board of Equalization the power to review for a period not exceeding twenty days for the equalization of assessments by the county board.

However, as I have said, the law is not mandatory, and you in this regard and you have a perfect right to continue your proceedings as a board of equalization when all applicants have been heard and you are the judges as to the proper time to allow to each applicant and when acting upon evidence presented by you, either by the applicant or by other witnesses, you have determined whether or not an assessment should be raised or lowered, your action is conclusive and binding upon the applicant, as well as upon the assessor.

Respectfully submitted,

CITY ATTORNEY.

BOARD OF SUPERVISORS

July 17, 1935.

UBJECT: In Re, Passage for Second Reading of Ordinance appropriating from Emergency Reserve Fund by less than Three-Fourths Vote.

ear Sir:

I have your letter of July 3rd, 1935, enclosing copy of a etter from Mr. W. H. Nanry, Director of San Francisco Bureau of overnmental Research and asking that I advise you as to the matters eferred to in Mr. Nanry's letter. His letter reads as follows:

"At the June 24th meeting of the Supervisors, an ordinance (No. 15 on the calendar) appropriating $5,000 from the Emergency Reserve Fund was 'passed to print' with only eight Supervisors present. As you know, under Section 79 of the charter, a number of formalities are required to make any appropriation from this Fund, including the vote of three-fourths of the Board of Supervisors. It was stated that this could be passed to print or passed for second reading by a majority vote, and that the three-fourths vote would be required only on 'final passage'.

"I am not familiar with the law on the subject, nor was it stated that the City Attorney had given any opinion on this matter, but it would seem that it is a dangerous precedent to establish. The last paragraph of Section 19 of the Charter, defining fractional votes of any board or commission, together with Section 13, dealing with the adoption of resolutions and ordinances, when taken together, seem to provide no alternative, but a three-fourths vote at each separate reading, and each separate meeting of the Board at which the particular subject matter is considered."

OPINION

The ordinance referred to in Mr. Nanry's letter reads as follows:

"Appropriating $5,000 From Emergency Reserve, for Payment of Telephone Tolls of the City and County for Period March to June, Inclusive, 1935.

(Code No. 9.051)

Also, Bill No. 753, Ordinance No. 9.051190, as follows:

Appropriating $5,000 from Emergency Reserve, Appropriation No. 2.900.00, to the credit of Appropriation No. 33.225.00 for the purpose of meeting the telephone tolls of the City and County for the months of March, April, May and June, 1935.

Be it ordained by the People of the City and County of San Francisco, as follows:

Section 1. The sum of $5,000 be and is set aside from Emergency Reserve, Appropriation No. 2.900.00, to the credit of Appropriation No. 33.225.00, for the purpose of meeting the telephone tolls of the City and County for the months of March, April, May and June, 1935.

Ayes - Supervisors Colman, Havenner, Hayden, McSheehy, Ratto, Roncovieri, Schmidt, Shannon, Uhl - 9.
Absent - Supervisors Brown, Gallagher - 2."

Section 79 of the Charter provides for the setting up of an Emergency Reserve Fund and that appropriations shall be made therefrom only on the recommendation of the department head concerned, the approval of the Chief Administrative Officer, the recommendation of the Mayor, and a vote of three-fourths of the Board of Supervisors.

I take it that there is no question but that the purpose for which the appropriation is made is an emergency one. If I remember correctly, you had some discussion with me as to whether it was necessary to state in the ordinance itself the emergency for which the appropriation is made and I will deal with this point first.

Section 79 of the Charter was amended in 1933 in two respects, first, by permitting a reserve fund greater than one percent of the amount of the tax levy; and, second, by permitting the use of this reserve fund to meet an emergency, as defined in Section 16 as well as in Section 25 of the Charter. Prior to the amendment the use of the Emergency Reserve Fund was limited only to such an emergency as is defined in Section 25.

Section 79, as it originally stood, was in no way tied in or dependent upon Section 16. The last mentioned section really deals with the effective dates of ordinances and permits an ordinance to become effective immediately only when it is passed as an emergency measure and

[illegible]

[illegible]

[illegible]

[

when the character of the emergency is set forth in the ordinance. In the instant case no attempt was made to pass the ordinance as an emergency measure as it was reported favorably by the Finance Committee, read and passed for second reading and finally adopted by nine votes. Section 79, which deals with appropriations from the Emergency Reserve Fund, contains no statement that the ordinance appropriating from the Emergency Reserve Fund must contain a statement of the character of the emergency, nor is there anything in Section 16 which would require such a statement in the ordinance. These two sections tie in, one with the other, only to the extent that Section 79 refers to Section 16 for the definition of an emergency and not for the purpose of saying how an ordinance appropriating from the Emergency Fund shall be passed.

This being the case it must be presumed that the Board of Supervisors would not pass an ordinance appropriating from the Emergency Reserve Fund unless the facts demanding it came within the definition of emergency as contained in Sections 16 and 25. If the emergency were such that it would require the immediate appropriation of the money, the character of the emergency might be set forth in the ordinance and if it received the requisite number of votes it would become effective immediately. While, for the information of the Controller, it might be good practice for the nature of the emergency to be set forth in the ordinance, I am of the opinion that the Charter is not mandatory upon the subject.

I note the statement contained in Mr. Nanry's letter to the effect that on first reading the ordinance was passed for second reading by eight votes and that it was only on final passage that it received the requisite nine, or three-fourths, vote of the Board. In my opinion this is not a fatal defect.

The provisons in the old Charter and in the present Charter are not dissimilar. Section 13, Chapter I of Article II of the old Charter dealt with the publication of bills and resolutions. The pertinent portion of the section reads as follows:

> "Every bill or resolution providing for any specific improvement, * * * * * * shall, after its introduction, be published in the official newspaper with the ayes and noes, for at least five successive days * * * * before the final action upon the same. If such bill be amended, the bill as amended shall be advertised for a like period before final action thereon."

Section 13 of the present Charter deals with the same subject matter and provides as follows:

> "An ordinance shall be passed by the board of supervisors only after reference to and report thereon from committee, unless it be an ordinance prepared and reported out by committee, and after two readings and votes at separate meetings of the board, which meetings shall be at least ten days apart; * * * * * *
>
> "The vote on all ordinances and resolutions upon each reading shall be by ayes and noes. The vote by ayes and noes on all

[illegible] the character of the emergency is not fixed in the evidence. In [illegible] a lawyer does do attempt the rule to pass the constitution as an emergency [illegible] as it was reported favorably by the Finance Committee, read and passed for having enabling and finally adopted by acclamation. Section 9, [illegible] deals with appropriations from the Emergency Reserve Fund, contains [illegible] statement that the authority appropriating from the Emergency Reserve [illegible] must contain a statement of the character of the emergency. Now it [illegible] appropriating in another is which would require such a statement in the [illegible] authorize. These two sections file in, one with the other, only in the [illegible] that implies it before to declare it due the particular if an [illegible] emergency and not for the purpose of making the appropriation [illegible] the Emergency Fund shall be passed.

This being the case it must be presumed that the Board of Supervisors would not make an unknown appropriation from the Emergency Reserve [illegible] unless the Board determine it and the particular of emergency [illegible] specified in section 9 and 10. If the emergency were such that it [illegible] requires the immediate appropriation of the money, the character of [illegible] emergency might be not found in the ordinance and if it provided the [illegible] provision of being it would be the effective immediately. While, [illegible] the interpretation of the constitution, it might be good practice for the [illegible] of the emergency to be set forth in the ordinance, I am of the [illegible] that the character is not mandatory upon the Board.

I make the following application to Mr. Murray's letter to the [illegible] that on first reading the ordinance was passed for second reading [illegible] eight votes and that it was only on final passage that it received the [illegible] vote, or three-fourths, vote of the Board. In my opinion this [illegible] not a fatal defect.

The provisions in the old Charter and in the proposed Charter are [illegible] similar. Section 12, Chapter 2 of article 11 of the old Charter [illegible] the publication of bills and resolutions. The pertinent portion [illegible] of the section reads as follows:

"Every bill or resolution providing for any specific improvement, * * * * shall, after its introduction, be published in the official newspaper with the ayes and nays, for at least five successive days * * * before the final action upon the same. If such bill be amended, the bill as amended shall be published for a like period before final action thereon."

Section 12 of the proposed Charter reads with the same subject matter and provides as follows:

"The ordinance shall be passed by the board of supervisors only after reference to and report thereon from committees, unless it be an ordinance fixing wages and authorized by an emergency, and after two readings which votes at separate meetings of the board, at least five days shall be at least the date hereof; * * * * * *

"This rule may be all dispensed and provisions the rule and read- ing shall be by ayes and nays. The votes by ayes and nays on all

measures shall be recorded in the journal of the proceedings of the board."

The old Charter required a vote of more than a majority of the oard for the passage of certain ordinances or resolutions. Among such rdinances was the ordinance fixing the annual tax rate which, under cerain conditions, required a vote of at least fifteen of the eighteen embers of the Board. On September 15, 1930, when the Board of upervisors was dealing with the fixing of the tax rate pursuant to the proisions of the old Charter, I advised the Board that, under existing onditions, while it might take fifteen votes to finally pass the ordinance, t could be passed to print by a majority vote of the Board.

In reaching this conclusion I followed the opinion of my preecessor, Mr. George Lull, which he gave to the Board of Supervisors on ugust 19, 1918, on a similar subject. Mr. Lull, in his opinion, said:

"It is my opinion that the provision of the Charter requiring an affirmative vote of fifteen members of the Board for the adoption of the ordinance fixing the tax levy for the year ending June 30th, 1919, applies to the vote on final passage. The vote after introduction, on passing to print may be considered in the nature of a motion to have the proposed ordinance printed as required by the provisions of Section 13 of the Charter above referred to. Such a motion would under no interpretation of the Charter provisions require more than a majority vote of the members of the Board."

You further direct my attention to the fact that Mr. Manry, in separate communication to you, alleges that on July 8th the above menioned ordinance was adopted on final passage with only eight supervisors resent, his claim being that nine supervisors attended the meeting on uly 8th - Supervisors Brown and Gallagher being absent on leave - and hat prior to the vote on this ordinance Supervisor Colman had been xcused.

The Journal of the Board of Supervisors for July 8th shows that n final passage the said ordinance received nine votes and that Supervior Colman was among those who voted for it. It is a well settled prinple of law that the journals of the legislative body is prima facie roof of regularity in the adoption of an ordinance and that the burden f proof of showing that it was not regularly adopted rests upon those uestioning its validity. See MYRCED COUNTY vs. FLEMING, 111 Cal. 46; lso, PEOPLE vs. LIMMERMAN, 11 Cal. App. 116.

Aside from the examination of the Journal of the Board I have nquired from those whose duty it was to keep the records of the proceedings on that particular day - that is, J. C. Dunnigan, Clerk of the Board, nd David A. Barry and Sam Conlin, Assistant Clerks - as to the actual ppenings and they advise me that Supervisor Colman was present and oted in favor of the final passage of the ordinance.

In view of these statements it is highly improbable that the courts would go back of the statement contained in the Journal unless Mr. Colman himself would substantiate the fact that he did not vote for the ordinance. Unquestionably, while the Journal of the Board is prima facie proof of the statements contained therein, these statements are subject to inquiry on the part of any one contesting their correctness in a direct court proceeding instituted for that purpose. I feel quite sure, however, that in the instant case there would be little likelyhood of personal liability on your part for obeying the mandates of the ordinance for I cannot bring myself to believe that the law places upon you the obligation of ascertaining, outside of the record, as to whether any ordinance or resolution received the requisite number of votes.

In other words, I believe that you are justified in relying upon the ordinance itself if it shows upon its face that it has been passed in accordance with the provisions of the Charter. However, I may say that the greatest care should be exercised by the legislative body in registering a vote when any question might arise in the future as to there being a sufficient number of members actually present in the room in order to cast the requisite vote to pass the ordinance.

You are therefore advised that, if the Journal of the Board of Supervisors for July 8, 1935, shows that the above mentioned ordinance received nine votes on final passage, and no action has been commenced to determine that the statements contained in the Journal are incorrect, you are justified in honoring the appropriation made by the ordinance.

Very truly yours,

CITY ATTORNEY.

To the -
Controller.
Copy to -
W. W. Nanry.

#1.

July 17, 1935.

SUBJECT: In Re, Final Passage of Supplemental Appropriation Ordinances after end of Fiscal Year.

Dear Sir:

I have your letter of July 3rd, 1935, in which you ask the two following questions:

"First: Necessity under Section 79 of the Charter to have three-fourths vote of the Board of Supervisors when ordinance is passed for second reading.

"Second: May an appropriation of one fiscal year, passed to second reading on the last possible day of that year, be finally passed in a succeeding fiscal year?"

As I have already answered your first inquiry in an opinion of this day I will not refer to it in this communication. Answering your second inquiry:

OPINION.

Section 80 of the Charter deals with the matter of unused and unencumbered appropriations, including appropriations made pursuant to Section 78 for libraries, parks, squares, playgrounds, etc., and provides that they shall be transferred by the Controller, at the close of such year, to a cash reserve fund. The same section provides that such unused and unencumbered appropriations, when not transferred to a cash reserve fund, shall be held as surplus and that such surplus shall be taken into account as revenue of the ensuing year, provided that any surplus created or existing in any fiscal year may be appropriated by the Board of Supervisors at the last meeting of said Board in any month.

Ordinarily the expenses of a fiscal year can be paid, after the end of that year, provided that funds from that year are available. The Constitutional prohibition found in Section 18 of Article XI does not run against the payment of obligations during a year subsequent to the one in which such obligations were incurred but it does prohibit the payment of such obligations out of the income arising during the subsequent year.

Our Charter sets up a scheme whereby unencumbered balances find their way into a cash reserve or surplus which can gradually be piled up so as to care for expenditures during the succeeding year which must be met before the ordinary income of the city is available. I cannot believe however, that it was the intention of the framers of the Charter that this fund could be piled up for subsequent years at the expense of those to whom the city is indebted. Furthermore, this section must be administered to the end that justice, rather than injustice, shall be done.

There can be no question but that it would be almost a physical impossibility for each department to have its accounts incurred for the last month of the fiscal year all paid and disposed of before the end of the month for the reason that many of said accounts are not obtainable or complete until the beginning of the succeeding month. It would therefore be impossible to determine whether a surplus existed in any particular department or not.

Therefore, unless a matter can be carried over for a reasonable period into the new year it would not be possible to transfer balances remaining at the end of the fiscal year from one department to another. Furthermore, the Charter seems to indicate that it lies within the power of the Board to make these supplemental appropriations at the last meeting of any month and therefore they have the right to make such appropriations at the last meeting in June as well as at the last meeting of any other month.

Under ordinary conditions a supplemental appropriation ordinance which might be introduced at the last meeting of the month cannot be finally passed until at least ten days thereafter. Therefore, it would appear to me that it was not the intention of the framers of the Charter to draw the line so fine that an appropriation ordinance introduced and passed for second reading at the last meeting in June cannot be completed and finally passed within a reasonable time after the commencement of the new fiscal year.

You are advised accordingly.

Respectfully submitted,

CITY ATTORNEY.

To the -
Controller.

#1.

July 23, 1935.

SUBJECT: In Re, Appropriation of $250,000.00
to Agricultural District 1 A -
1935-1936 Budget.

Dear Sir:

I am in receipt of your letter enclosing a copy of a letter addressed to you by W. H. Nanry, Director of the San Francisco Bureau of Governmental Research, Mr. Nanry's letter reading as follows:

"In the budget and the appropriation ordinance for 1935-36 recently adopted by the Supervisors and approved by the Mayor, there is included an appropriation of $250,000 for Agricultural District #1A. It is our understanding that this sum is to be paid by the City and County to the governing board of the Agricultural District, and, together with sums from other sources to be received by the governing board of such District, to be spent by such board for a livestock pavilion and other purposes. Also that the construction and acquisition of the plant, and the subsequent management and operation thereof, will be under the complete control of the governing board of the Agricultural District.

"We believe there is a question as to the legal right of the City and County to make this appropriation, or for the Controller to authorize any expenditure out of such appropriation. Section 2 of the charter, in defining the powers of the City and County, states in part as follows:

'The city and county.....shall have all rights and powers appropriate to a county, a city, and a city and county, subject only to the restrictions and limitations provided in this charter, including the power to acquire and construct plants, works, utilities, areas, highways and institutions outside of the boundaries of the city and county, and maintenance and operation of the same, and the exercise of functions or maintenance of services outside of the boundaries of the city and county, including the expenditure of funds therefor through any agency.'

"It would appear that these provisions vest authority in the City and County to make expenditures outside of its boundaries, but only for works to be acquired or constructed

by the City and County, or for functions to be exercised or services maintained by the City and County. The proposed expenditure for Agricultural District #1A probably does not come within this specification of legal expenditures by the City and County, for works or functions outside of its boundaries.

"Section 69 of the charter provides for the filing of budget estimates by 'every department and office of the city and county'. No provision is made for the filing of estimates by any outside unit, such as Agricultural District #1A.

"Section 72 provides in part that 'the mayor shall transmit to the board of supervisors a consolidated budget estimate for all departments and offices of, and the proposed budget for, the city and county for the ensuing fiscal year.....'. The same section authorizes the Supervisors to decrease or reject any item contained therein and to 'increase or insert appropriations for capital expenditures and public improvements'. The last quoted provision, taken in connection with the other provisions of the charter, would seem to apply only to capital expenditures and public improvements for city and county purposes. This same section provides that the 'several amounts of estimated revenue and proposed expenditure contained in the annual appropriation ordinance as adopted by the board of supervisors, shall be and become appropriated for the ensuing fiscal year, to and for the several departments, bureaus, offices, utilities, boards or commissions, and for the purposes specified.....'

"If there be any provision in the general laws of the State purporting to authorize a city or a county to make any payment to an outside and independent governmental subdivision, such as is involved in the appropriation of $250,000 for Agricultural District #1A, it would appear that this could have no force or effect on the City and County of San Francisco, due to the fact that provision is made in our charter (Section 22) covering such matters, and, that under such provisions, the payment in question probably is not authorized.

"In view of these facts, the Bureau respectfully suggests to the Controller that an opinion be secured from the City Attorney as to the legality of this appropriation and any expenditure to be authorized therefrom. If such opinion is requested, and when it is received, we would appreciate your advising us thereof."

OPINION.

Two questions arise in disposing of the inquiry made.

First: Is the appropriation permissible under the general laws of the State?

Second: Is it permissible under the provisions of our Charter, and does the procedure followed in making the appropriation conform with the Charter?

Answering the first inquiry -

Agricultural District #1A is organized pursuant to an Act of the Legislature approved April 17, 1909, and amended in 1923, 1927, 1929 and 1931. See Deering's General Laws, Vol I, page 44. The same Act is now practically embodied in the Agricultural Code of 1933 - see Deering's General Laws 1933, page 808. The Act of 1909 is a continuation of the Act of 1880 which was the original Act authorizing the formation of District Agricultural Associations.

The general purposes for which the associations mentioned are to be formed are "for the purpose of holding fairs, expositions and exhibitions of all of the industries and industrial enterprises, resources and products of every kind and nature of the State, with a view of improving, encouraging and stimulating the same." These associations are organized for public purposes, and are public agencies.

See: PEOPLE v. SAN JOAQUIN AGRICULTURAL ASSOCIATION, 151 Cal. 797.

In this case the Supreme Court said:

"The provisions of the act providing for district agricultural associations clearly evince an intention to make them public corporations. The entire state was divided into agricultural districts. Fifty or more persons, representing a majority of the counties within one of the districts, were authorized to form an association for the purposes of the act. The association was to have perpetual succession and certain enumerated powers. Its real estate was to be used for the purpose of holding exhibitions of the live-stock and products of the district, 'with view to the improvement of all industries in the same.' It was to be managed by a district board of agriculture, consisting of eight members, who were to be resident citizens of the district, were to hold office four years, and were to be appointed by the governor of the state, who was also authorized to fill vacancies. Each member of such board was required to qualify, by taking the oath of

office of public officers prescribed by section 3 of article XX of the constitution, within ten days after his appointment. Section 17 of the act is in part as follows: 'Each association so formed and organized is hereby declared and shall be recognized a state institution, and the board so appointed and qualified shall have the exclusive control and management of such institution for and in the name of the state, and shall have the possession and care of all the property of the association, and shall fix the terms of office and the bonds of the secretary and treasurer, and determine their salary and duties.' "

Also: SIXTH DISTRICT AGRICULTURAL ASSOCIATION v. WRIGHT, 154 Cal. 119.

In this case the court held that an agricultural association organized under the Act of 1891 is a state institution, a public agency of the State which is within the exclusive management of the State and is charged with the performance of a part of the functions of the State government.

The associations having been formed for a public purpose, the prohibition contained in Section 31, Article IV of the Constitution does not apply.

See: DAGGETT v. COLGAN, 92 Cal. 53.

This case dealt with an appropriation made by the State Legislature for the purpose of erecting building and maintaining an exhibit for California at the World's Fair Columbian Exposition to be held in Chicago in 1893. The objection was made that the appropriation constituted a gift and was in conflict with the provisions of the Constitution. In determining the question the court said:

"The defendant further contends that the statute is unconstitutional for the reason that the appropriation thereby made is not for a public use, such as the state is authorized to make; that the maintenance of an exhibition of the products of the state in the manner contemplated does not fall within the legitimate authority of the state government.

"In passing upon this proposition, it is necessary to bear in mind that what is for the public good, and what are public purposes, 'are questions which the legislature must decide upon its own judgment, in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive.....Where the power which is exercised is legislative in its character, the courts can enforce only those

limitations which the constitution imposes; not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives.' (Cooley's Constitutional Limitations, 154.)

"It is undoubtedly true that public money can be rightfully expended only for public purposes, but as was well said by that eminent jurist, Judge Cooley, in delivering the opinion of the court in People v. Salem, 20 Mich. 452, 4 Am.Rep. 400: 'Necessity alone is not the test by which the limits of state authority in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people.'

"In view of these principles of constitutional law, which are so well settled as to be placed beyond discussion or dispute, it is manifest, we think, that the court is not authorized to declare the act under consideration void, upon the theory that the expenditure thereby authorized can in no manner be considered as tending to promote the public welfare, which it is one great object of government to secure."

See also: ALLIED ARCHITECTS' ASS'N. v. PAYNE, 192 Cal. 431.

This case involved an expenditure of $500,000 by the County of Los Angeles for the purpose of constructing a memorial hall to be occupied exclusively by veterans. The objection to the payment of the amount was made upon the ground that it was a gift of public moneys. The court held that it was not, saying:

"But aside from this the granting of the use of the memorial hall cannot, we think, in any view which may be taken of the case, be said to fall within the inhibition of the constitution against the making of a gift of public money, or thing of value to any individual, municipal, or other corporation. A gift is defined by the Civil Code to be 'a transfer of personal property, made voluntarily, and without consideration.' (Sec. 1146, Civ. Code.) 'A gift is something bestowed without return.' (Miller v. Dunn, 72 Cal. 462, 474 (1 Am.St.Rep.67, 14 Pac. 27).) 'To be a gift this voluntary transfer must be gratuitous - a handing over to the donee something for nothing.' (Yosemite Stage etc. Co. v. Dunn, 83 Cal. 264 (23 Pac. 369).) The gift which the legislature is prohibited from making is not limited, of course, to a 'transfer of personal property'

as defined by section 1146 of the Civil Code, but includes all appropriations of public money for which there is no authority or enforceable claim, or which perchance may rest upon some moral or equitable obligation. (Conlin v. Board of Supervisors, 99 Cal. 17, 21 (37 Am.St.Rep. 17, 21 L.R.A. 474, 33 Pac. 753).) But a gift as implying a gratuity, that is, something for nothing, or as expressed in Miller v. Dunn, supra, 'something bestowed without return,' is the 'gift' meant by the constitution. It cannot, we think, be truthfully said that in the instant case there will be no return for the benefit conferred. While it is true that the return anticipated is incorporeal and intangible, it is nevertheless a very vital and valuable return to the state. The promotion and promulgation of patriotism upon which the state must rely for its own self-preservation is in truth and in fact a good consideration for the thing granted by the state and justifies the extending the bounty of the state."

Finally on this point, the recent case of SAN FRANCISCO v. COLLINS, 216 Cal. 187, which involved the right of the City and County to care for its poor. In passing upon the point the court said:

"The final question which must be answered relates to the provisions of article IV, section 31, of the California Constitution, prohibiting the giving, lending or pledging of the credit of the state or any subdivision thereof, in aid of any individual, association, or corporation, and also prohibiting the making of any gifts or public money or other things of value to any individual, association, or corporation. It is contended that the proposed bond issue is a gift in violation of this section. It must, however, be considered as settled by the recent decision of this court in the case of Patrick v. Riley, 209 Cal. 350 (287 Pac. 455), that the expenditure of public money in pursuance of a public purpose is not within the scope of the prohibition."

In view of the foregoing I am of the opinion that the contribution by the City and County to the Agricultural District, being for a public purpose, does not come within the Constitutional prohibition preventing the gift of public moneys.

We therefore approach question two:

I have noted Mr. Nanry's contention to the effect that our Charter prohibits the expenditure of municipal funds for public works outside of the city exeept when such funds are expended directly by the city. I cannot agree with his contention nor do I believe that it was the intention of the charter framers that so narrow a construction should be given to Section 2 thereof. I believe that the determining factor should be: "Is the public work or improvement for the benefit of San Francisco?"

In the instant case it is for San Francisco is a part of Agricultural District #1A. This being so the improvement is being made for the benefit of the people of the city. To take the contrary view would prevent the city making a contribution to the State itself or to a highway district for the purpose of constructing or aiding in the construction of a highway leading to or from the city.

As a matter of fact, I believe the express language of the Charter negatives Mr. Nanry's contention. The city is given all the powers appropriate to a county, a city and a city and county, subject only to the restrictions and limitations contained in the Charter. There is no limitation against the expenditure.

Further, the same section states that: "The specification or enumeration in this Charter of particular powers shall not be exclusive". Therefore such additional powers may be exercised by the City and County as may be allowable under the general powers granted to the Board of Supervisors, or by any specific law enacted incident to the present subject matter.

By the Act of June 9, 1931, (Statutes 1931, page 1458) the Legislature appropriated the sum of $250,000 to Agricultural District #1A for the purpose of the erection of an exposition building by the district, providing by the Act that the appropriation would not be available until a like sum was deposited with the district by the City and County of San Francisco or other public or private corporation, etc., to be expended for the same purpose.

This Act was practically an authorization to the City and County to expend the amount specified.

See: COUNTY OF LOS ANGELES v. GRAVES, 210 Cal. 21.

The cited case dealt with the right of the County of Los Angeles to match an allotment from Bonds voted for state park purposes for the purpose of financing a park to be under the jurisdiction of the State. The State Park Bonds Act provided that any county desiring to obtain the benefits of the Act should contribute to the acquisition of the park an amount equal to that which came from the Park Bonds.

The question before the court was as to the right of Los Angeles to match the contribution. In disposing of the question the Supreme Court said:

> "We cannot agree with respondent's contention. By the enactment of the California State Park Bonds Act (Stats. 1927, Chap. 765, p. 1480), provision was made for the creation and maintenance of a state park system. Section 5 of that act provides, in part, that 'the state park finance board shall direct the sale of bonds only when there

Ports

has been deposited with the state treasury a fund from private gift, city or county appropriation, or from some source other than appropriation by the people of the state of California, or the sale of state bonds, which shall be equal to the amount to be realized for the project intended to be accomplished from the sale of bonds as hereinabove provided, except that the state park finance board shall authorize the sale of bonds for the purposes indicated in this act to carry out any park project for the acquisition of lands and properties when it is shown to the satisfaction of the state park finance board that half the total value involved in such project has been provided from sources other than appropriation by the people of the state of California or the sale of state bonds, in the form of land, timber or other properties, or in money, or in any or all such properties.....' (Italics added.) From this provision it clearly appears that it was the intention of the legislature, as expressed in the plan of the California State Park Bonds Act, that moneys derived from the sale of state bonds shall be expended for the acquisition of park properties when, and only when, they are matched by funds in an equal amount or property of an equal value 'from sources other than appropriation by the people of the state or the sale of state bonds.'

"It is our opinion that the language of section 5 of the act is sufficiently comprehensive to authorize the transfer of county funds or property for state park purposes. Any other construction of the section would render the phrase 'city or county appropriation' meaningless and useless."

* * * * * * * *

"Even if the act be presumed to be deficient as an express grant of such authority, this need not prove fatal to petitioner's cause, for counties are invested with, and are free to exercise not only such powers as have been expressly granted to them but also such powers as have been granted to them by necessary implication. (See secs. 4000 and 4041, subd. 25 (1929 Supp.Codes and Gen.Laws, p.2652), of the Political Code.) It cannot be questioned that the State Park Bonds Act, supra, impliedly at least, authorizes counties to contribute either funds or properties to the development of the park system therein provided for."

I am therefore of the opinion that, aside from any other existing authority, the Act of 1931 implies the right of the city to match the contribution of the State.

Next Mr. Nanry adverts to the fact that no estimate was filed by Agricultural District #1A as provided by Section 69 of the

Charter. Suffice to say that the district is not a department of the City and County of San Francisco.

Also Mr. Nanry adverts to the fact that it is not within the power of the Board of Supervisors to include the amount of the appropriation in the budget for the reason that the only power which the Board could exercise was to add an appropriation for capital expenditures or public improvements.

The proposed expenditure is to aid the Agricultural District in the construction of a live stock exposition building. This is not a contractual service. It is a capital expenditure which the people of San Francisco may enjoy and, while it may not be owned by the city, a state agency owns it for the benefit of the people of the city.

In MARIN U. JUNIOR COLLEGE DISTRICT v. GWINN, 106 Cal.App. 12, the court, in defining a capital expenditure said:

> "A capital expenditure is in the nature of an investment for the future, whereas the cost of maintenance is a definite present expense."

In view of the foregoing I am of the opinion that the appropriation is legal and should be paid when funds are available.

Very truly yours,

_____
CITY ATTORNEY.

To the -
Controller.

#1

July 26,1935.

SUBJECT: Ordinance Subject to Referendum
Terms of Charter Effective Thirty
Days After Approval by Mayor.

Dear Sir:

A note from you on yesterday inquires as to the effective date of an ordinance, passed by the Board of Supervisors and signed by the Mayor, amending a section of Ordinance 5132, New Series, which provides a license tax on a certain endeavor carried on in this municipality.

OPINION.

Section 16, of the Charter, as amended this year, provides that "No ordinance which is subject to the referendum provisions of this charter shall become effective until thirty days after its passage."

A reference to the terms of Section 179, as amended also this year, indicates that the subject matter of this legislation makes the same subject to the referendum act. Such being the case, the ordinance under consideration becomes effective and operative thirty days subsequent to the date of approval of the same by the Mayor, and you are so advised.

Respectfully,

City Attorney.

TAX COLLECTOR.

July 26, 1935.

SUBJECT: In Re, Serving Probationary Period while on Leave of Absence; and also
In Re, Making Permanent Appointment to Position made Vacant by Indefinite Leave of Absence of Occupant.

Dear Sirs:

I am in receipt of your letter of this date wherein you direct my attention to the fact that a vacancy having occurred in the position of Superintendent of the Bureau of Sewer Repair in the Department of Public Works and that John J. Casey, occupying the exempt position of City Engineer in the same Department, was appointed to the position and, after appointment, was granted, with the approval of your Commission, an indefinite leave of absence from the said position of Superintendent of the Bureau of Sewer Repair; and to fill the vacancy caused by the leave granted to Mr. Casey, Emile F. Muheim, the next highest eligible, was appointed to the position.

You ask the following questions:

"(A) As to whether or not said John J. Casey can serve his probationary period in the Civil Service position of Superintendent, Bureau of Sewer Repair, Class O-216, in the Department of Public Works, while he is on leave of absence from said position and occupying the exempt position of City Engineer in the same Department of Public Works?

"(B) If your answer to query (A) is yes, is it permissible to appoint the above mentioned Emile F. Muheim to said position of Superintendent, Bureau of Sewer Repair, Class O-216, as a permanent position, and for him to serve his probationary period therein, while, at the same time, said John J. Casey is also serving his probationary period in the same position?"

OPINION

Question One - Under the provisions of Section 148 of our present Charter, an appointment to a position declared permanent by the Commission shall be on probation for the period of six months. It is a well settled principle of civil service that the purpose of a probationary period is to permit the appointing power to ascertain the fitness of the appointee to the position to which he may have been appointed.

See: PEOPLE v. LYMAN (Court of Appeal,N.Y.)
52 N.E. 132.

In this case the Court said:

"When the relator was appointed, one of the rules established by the civil service commission was as follows: 'Every original appointment or employment in the civil service shall be for a probationary term of three months, at the end of which time, if the conduct and capacity of the person appointed or employed shall have been found satisfactory, the probationer shall be absolutely appointed or employed, but otherwise his appointment shall cease.' It is manifest that the purpose of the statute and rule relating to probationary appointments was to enable the appointing officer to ascertain and correct any error or mistake of himself or of the civil service commission arising from the inefficiency of a candidate certified as eligible, where he might prove incompetent to discharge the duties of the place to which he was appointed."

Such being the purpose of the probationary period there can be no valid reason why it cannot be considered served while the appointee is occupying a higher position in the same department. It is to be presumed that the higher position carries with it more exacting duties, and if the appointee proves himself qualified to perform these duties it would follow that he is qualified to perform those of the lower position.

This is doubly true when the occupant of the higher position has to any extent supervision over the lower one, as he has in the instant case. As long as the two positions are in the same department the appointing power has the same opportunity to judge of the habits and ability of the appointee as it would were he occupying the subordinate position.

I am therefore of the opinion that although Mr. Casey has been granted a leave of absence from the position of Super-

intendent of Sewer Repair he may serve his probationary period for that position while serving in the position of City Engineer.

Question Two - Section 148 above mentioned also provides that: "From the requisition of the appointing officer or otherwise the Commission shall determine whether the position is, in character, temporary, seasonable or permanent, etc."

Therefore you may take the statement of the appointing officer on the subject or you may make such independent investigation as may enable you to determine the character of the position. The fact that some one else is serving his probation for the same position while the appointee is on leave of absence from said position and occupying a higher one does not, in my opinion, enter into the question to any greater extent than if the former occupant of the position had already served his probation therein and then had been granted a leave of absence.

The question for you to determine in this regard is whether there is a possibility of the indefinite leave granted to Mr. Casey lasting for a period of six months. If you find that there is, then you may fill the vacated position as a permanent one. In the instant case the position is set up in the Salary Ordinance as permanent; that is, the appropriation for its maintenance has been made for the current year, in the same manner as it has been made for many previous years. Therefore the main question to determine is as to the length of Mr. Casey's leave. As far as the record shows, it is indefinite. It may last for a month or for many years. This being the case, it appears to me that no harm can come to either of the interested parties if the position is filled as a permanent one. If it lasts for six months Mr. Muheim will have served his probationary period. If it does not, and Mr. Casey's leave being terminated, he will then be entitled to occupy it. But as the leave is indefinite it appears to me that Mr. Muheim should be given the right to serve his probation to the end that if the position really ripens into a permanent one he may continue to occupy it.

Very truly yours,

CITY ATTORNEY

To the -
Civil Service Commission
Copies to -
Director of Public Works,
City Engineer.

#1

[illegible]

Question One - Should the [illegible] be [illegible] [illegible] of our already [illegible] [illegible] [illegible]

intendent of Sewer Repair he may serve his probationary period for that position while serving in the position of City Engineer.

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Very truly yours,

CITY ATTORNEY

To the -
Civil Service Commission
Copies to -
Director of Public Works,
City Engineer.

#1

July 31, 1935.

SUBJECT: Interpretation of Specifications
with regard to Changes and Alterations
- Brannan Street Sewer Construction.

Dear Sirs:

This office is in receipt of your request for an opinion as follows:

"The Department of Public Works has become involved in a difficulty with the contracting firm of MacDonald & Kahn Co. Ltd. with respect to certain changes and alterations in sewer work on Brannan Street. The contract and specifications are handed you for examination.

"Special Specifications (18790) called for the relining of the existing tunnel with concrete at a stipulated price per cubic yard. At page 25 of said Special Specifications, the duty is imposed upon the contractor to 'remove such portions of the existing sewer and make such excavation as will be necessary to permit the construction of the new sewer of the minimum section shown on the plans'. After the concreting had been completed on the invert, the contractor was directed to discontinue concreting of the inner surface of the tunnel as originally contemplated and to proceed merely to gunnite the remaining surface. Such change in the contract was ordered by the City Engineer, pursuant to his view of Section 286 of Standard Specifications, which Section permits 'alterations'. Under protest the contractor acquiesced in the orders of the City Engineer and abandoned the originally contemplated method of construction.

"It is the contention of the contractor that by the aforementioned change the City was guilty of a breach of contract and that the contractor is now, therefore, entitled to damages for such breach.

"It should be noted that compensation to the contractor was at a particular rate per unit of installation, even though various duties had to be performed by the contractor in preparing the existing tunnel for the work to be done. No specific compensation was agreed to for the work called for at page 25 of the Special Specifications.

"Is the contractor right?"

OPINION

In addition to the receipt of the foregoing request, I have conferred with the City Engineer's Office and with counsel for MacDonald & Kahn Co. Ltd. in order to obtain all possible views of this situation.

At the outset I might state that it is obvious that the price per unit agreed to necessarily contemplated a completion of the job in substantial accordance with the original specifications. As indicated in the request, the City Engineer, in making the change, purported to rely upon Section 286 of the Standard Specifications. The first paragraph of that Section reads as follows:

> "The Board of Public Works, by resolution, may order alterations in the amount or dimensions of all or any part of the work herein contemplated either before or after the commencement of the work * * *."

The courts of this country have, on several occasions, found it necessary to construe the scope of similar reserved powers to alter and modify plans and specifications. The Supreme Court of Illinois in the case of COUNTY OF COOK v. HARMS, 108 Ill. 151, construed the meaning of "changes, additions and alterations". The court there said, at page 159:

> "The terms stated in the writing were, we think, the controlling inducement to the contract, and the 'changes, additions and alterations' therein provided for must have been contemplated and intended to be but such as were incidental to the complete execution of the work as described in the plans and specifications, * * *. We think any material departure from the plans and specifications with reference to which the contract was made, which resulted in a new and substantially different undertaking, cannot be regarded as within the meaning of this language. We think it was only intended to describe and provide against those ordinary and comparatively unimportant departures from the details in the plans and specifications which, during the progress of the work, might become necessary, or at least convenient, to effectually complete the work as it is contemplated by the plans and specifications it should be completed, and which could not, at the date of making the contract, have been certainly anticipated, and therefore provided against. We cannot admit that a party entering into a contract to do a given work at stipulated prices, can, by the use of these words in the written contract, be made to do a different and more expensive work at prices to be named altogether, or in large part, by the architect of the other party."

[illegible]

In addition to the [illegible] of the [illegible] [illegible], have [illegible] with the [illegible]'s [illegible] for [illegible] a [illegible] [illegible] [illegible]

In another connection, the Appellate Division of the Supreme Court of New York had occasion, in BRILL v. MILLER, 125 N.Y.Supp. 865, to define alterations as a change in form or state which does not affect the identity of the subject; and as stated by the New York Supreme Court in KEPNER v. SIMON, 195 N.Y.Supp. 333, at page 334: "Alteration and modification are not synonymous with substitution."

In determining the scope of the alteration paragraphs of the Standard Specifications, consideration must be given to two cardinal rules of construction. As was stated by the Supreme Court of California in HUNT v. UNITED BANK & TRUST COMPANY, 210 Cal. 108, at page 115:

> "It is a primary rule of interpretation that contracts must be construed as a whole, that is, from their four corners, and the intention of the parties is to be collected from the entire instrument and not detached portions thereof, it being necessary to consider all the parts to determine the meaning of any particular part as well as of the whole."

See also: TURNER v. COOK, 117 Cal.App. 399, at 402.

An equally well-known canon of construction is that noted by the court in STEIN v. ARCHIBALD, 151 Cal. 220, at page 223:

> "It is a well settled principal applicable to the construction of contracts that where one construction would make the contract unreasonable, unfair or unusual and extraordinary and another equally consistent with the language would make it reasonable, fair and just, that the latter construction must be adopted."

It should be noted also that the contractor was required to perform the gunnite work under Force Account.

Having in mind all the circumstances here present, it is my opinion that MacDonald & Kahn Co. Ltd. is entitled to damages in the amount of the profits which would have been realized had the contract been completed as originally contemplated. The stipulation in Section 286 of the Standard Specifications against allowances for anticipated profits in no way mitigates against this conclusion. That provision, coming as it does immediately after the reference to "alterations", is not applicable where the changes made are so material as to be outside the scope of the alteration provisions.

I call your attention to the language of the court in COUNTY OF COOK v. HARMS, supra, at page 159, which seems to be apropos to the present situation:

> "Obviously, under a contract to construct a framed

In another decision, the appellate division of the
[illegible] court of the first department in [illegible] v. [illegible],
[illegible] N.Y. [illegible], 1949, a [illegible] conditions as a [illegible]
[illegible] which [illegible] the [illegible] of the [illegible],
[illegible] by the New York [illegible] [illegible] v. [illegible],
[illegible] N.Y. [illegible], 1949, [illegible] "[illegible] and [illegible]
[illegible] the [illegible] [illegible] [illegible].

In [illegible] the [illegible] of the [illegible]
[illegible] the [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible]

building at stipulated prices, a party could not be required to construct a stone or brick building, at prices to be fixed by the architect of the other party, by the use of these words in the contract. Nor could a party, by virtue thereof, contracting to build a small and inferior brick or stone building, be required to construct a large and superior stone or brick building. The mere combination of proportions and quantities, even of materials of the same class or grade, may be so different in different buildings of the same dimensions, that a party would not make the same bid, or be able, without financial loss, to construct them all for the same price."

The correctness of my conclusions to the effect that the contractor is entitled to damages is borne out by the above quotation.

Respectfully submitted,

CITY ATTORNEY.

To the -
Department of Public Works

#3

August 5, 1935.

SUBJECT: Misleading Advertising of Food Products.

Dear Sir:

Replying to your request of July 24th for an opinion in regard to the validity of Executive Order No. 107, issued by your Department on March 29th, 1935, relating to labeling bakery products in such manner as to indicate that the products possess laxative qualities, and also requesting an opinion in regard to similar advertisements in newspapers and on bill-boards, please be advised as follows:

OPINION

If the statements on the label, wrapper or container are false in fact the propriety and validity of Executive Order No. 107 cannot be questioned. Such misbranding is definitely and expressly prohibited both by Ordinance No. 1426 (New Series) of the City and County of San Francisco and by the Pure Food and Drug Acts of the State of California.

False advertising of curative or laxative properties of food products in newspapers or on bill-boards constitutes an offense distinct from the misbranding of such products and the offender comes within the inhibitions of Section 654A of the Penal Code and of Act 6758, page 3802, of the General Laws of the State of California (1931) relating to misleading advertisements.

As the question presented in regard to newspaper and bill-board advertising relates to penal offenses, we would suggest that the matter be referred to our District Attorney. We are informed that he has a deputy detailed to this special branch of the law.

Respectfully yours,

CITY ATTORNEY.

To the -
Director of Public Health.

#5

August 14, 1935.

SUBJECT: The word "child" as used in the Constitution and By-Laws of Widows and Orphans Aid Association of the San Francisco Fire Department, does not include grandchild.

Dear Sirs:

Your request for an opinion as to whether the word child includes grandchild under the provisions of your constitution and by-laws has received our consideration and in particular as applied to the grandchildren named as his beneficiaries by the late Thomas Muldowney.

OPINION.

The law holds uniformly that, unless a particular instruments works an exception thereto, the word "child" does not include a grandchild.

In ESTATE OF WILLIAM CURRY, 39 Cal. 529, at page 531, the Court says:

> "There is no doubt that in the popular understanding the word "children" does not include grandchildren, but is confined to the descendants in the first degree - the immediate offspring; and it may generally be said, too, that the construction put upon this word by law accords with its popular signification."

In ESTATE OF WILLSON, 171 Cal. 449, the Court, on page 455, states:

> "The particular point involved in this interpretation of the will is the question whether the word "children", as used in these clauses, can be construed to include grandchildren. The court below held that the word "children" was to be taken in its ordinary sense, and inlcuded only the sons and daughters of the brothers and sisters and that it did not include grandchildren."

and, on page 457, in sustaining the lower court in its interpretation, further states:

> "There is nothing in the context of this will which throws doubt upon the meaning of the word "children" as

used in the residuary clauses, nothing to suggest that it was not used in the ordinary sense to describe the immediate offspring of the brothers and sisters named."

To the same effect is the holding in PIMEL v. BETJEMANN, 183 N.Y. 194, 76 N.E. 157 and cited and quoted in IN RE HUTTON'S ESTATE, 180 Pac. 882; 106 Wash. 578, on page 886, as follows:

"Nothing is better settled in the law of wills than that the term 'children' does not include grandchildren or more remote descendants, unless there is something in the will to show that the word was used in a broader sense. This is not based on any technical rule of law; on the contrary, it is founded on the ordinary meaning of the word and the presumption that the testator has used the term in its ordinary sense."

Although the term "child" may be used, at times, in a broad sense to effect a testator's intent, the courts must apply the stringent and restricted rule of interpretation in cases similar to the one submitted. One of the basic reasons for such interpretation is that both the organization and the member are bound by the constitution and by-laws of the organization and neither, nor both, can alter the fundamental laws of the organization.

JOURNEYMEN BUTCHERS' PROTECTIVE AND BENEV. ASSN.
v. BRISTOL, 17 Cal.App. 576;
GINSBERG v. BUTLER, 217 Cal. 467.

In JOURNEYMEN BUTCHERS' ASSN. v. BRISTOL (supra), at page 577, the Court states:

"Organizations like the plaintiff are generally created and instituted for the aid and relief of the families of deceased members, and usually their laws provide that the beneficiary of the fund must be a relative, and dependent on the deceased member, and that the appointee must be one of that class. (Caldwell v. Grand Lodge, 148 Cal. 195, (113 Am.St.Rep. 219, 82 Pac. 781, 2 L.R.A., N.S., 653); 3 Am. & Eng.Ency. of Law, 1042; 29 Cyc. 111.) Where the class of persons to whom the benefits shall be paid is prescribed by the society, neither the society nor the member, nor both, can divert the fund from that class, and the designation of an ineligible person is ordinarily void or ineffectual."

On page 579, the Court concludes its opinion as follows:

"Here the naming of an ineligible person is equivalent to the failure to designate anyone, and the mother, being an heir, must prevail."

[illegible]

[illegible]

[illegible]

In GINSBERG v. BUTLER, (supra), on page 470, the Court states:

"The rights of any claimant in a benefit certificate issued by a fraternal benefit society, or the proceeds thereof, are to be determined by a consideration of the provisions of the certificate, the by-laws of the society, and the provisions of the statute under which the society is organized, which together constitute the contract between the society and the insured member."

The foregoing statement is followed by the citation of numerous cases to the same effect. On page 471, the Court, quoting from BUSH v. MODERN WOODMEN, 182 Iowa 515, cited and followed in BENNETT v. MODERN WOODMEN, 52 Cal.App. 581, states as follows:

"The requirements of the statute as to eligibility of beneficiaries cannot be waived by action of the society, or member, or both. The language of the Supreme Court of Iowa in Bush v. Modern Woodmen, supra, cited and followed in Bennett v. Modern Woodmen, supra, is so apposite that we quote therefrom:

'It is almost the universal holding that a society of this kind can waive the enforcement of a requirement embodied in the by-laws, but it is elementary that a corporation such as this has no power to create a fund for persons other than the class specified in the law authorizing its organization and maintenance; and, as the corporation has no authority to create a fund for any other purpose, a member cannot direct that the fund be paid to a person outside of such class.' (Bush v. Modern Woodmen, supra.)

From the principles of law hereinbefore set forth we are of the opinion that the word "child" as used in the constitution and by-laws of your organization cannot be interpreted to mean grandchild.

Therefore it follows that the designation of his grandchildren by Thomas Muldowney, as his beneficiaries, was a void and ineffectual act as Section 1 of Article IV of your constitution provides:

" * * * and provided that if said member has a wife, child or children, or mother, then one or more of said relatives must be designated and no one else."

Section 2 of said Article IV, provides as follows:

"If no person shall have been so designated by the deceased, his widow shall receive such sum of money."

By reason of the general law and the specific provisions of your constitution and by-laws, we conclude that the act of Thomas Muldowney having been void, he died without a designated beneficiary. Therefore, under the provisions of Section 2 of your constitution, his widow is entitled to receive the total benefit.

Respectfully submitted,

CITY ATTORNEY.

To -
Widows and Orphans Aid Association,
San Francisco Fire Department,
Fire Commissioners' Office,
City Hall.

#5.

August 20, 1935

SUBJECT: Director of Public Health has no authority to issue Executive order; Expression "Avoid Constipation - The Natural Way" on label of bread valid.

Dear Sir:

Your communication of the twenty-fourth ultimo setting forth the history of the dispute between your office and the Marvel Bakery of Oakland, California, concerning the legality of the advertising pursued by the latter in advancing the sale of a certain kind of bread, particularly in the face of an Executive Order issued by you, concludes with a request for my opinion "as to the validity of the executive order, insofar as it affects bill-board and newspaper advertising."

Counsel representing the Marvel Bakery now presents for my consideration a similar review of the facts surrounding this argument existing between the interested parties, but extends the field of inquiry by questioning the validity of the Executive Order as to a control over any phase of advertising now used by the manufacture of this commodity. Further, it is suggested that I pass also upon "the validity of the label" in which the product is offered for sale to the consuming public.

It at once becomes apparent that the disagreement on the subject matter precipitates an inquiry into the proposition whether there is any warrant in law for the exercise by your office of a promulgation of orders having the effect and operation of an ordinance or statute.

Bearing in mind the respective positions of the parties, it is obvious that a finality cannot be assigned to the matter unless I render an opinion going to the very fundamentals of the authority of your directorship in the Department of Health to issue the regulations now questioned.

OPINION

In order to determine the basic authority of your office recourse must be had to the terms of our existing charter. Section 61 of that instrument states that "the director of public health shall have and continue the powers and duties of the health officer

[illegible], [illegible]

[illegible]: [illegible] of [illegible] should [illegible] an authority to issue [illegible] [illegible] "[illegible] [illegible]" [illegible] [illegible] [illegible].

Dear Sir:

[illegible] of the [illegible] within [illegible] the history of the [illegible] [illegible] [illegible]

and the board of health", which means an incorporation in your body, by reference, of those particularly expressed powers and duties set out in the charter recently superseded by the present organic law.

The repository of the foregoing is Article X of the municipal charter of 1899, and specifically sections 3 and 4 of that division are the measure and limitations of the powers and duties inherited by you. In other words, whatever is therein announced must be the extent and breadth of matters and subjects to be enjoyed and enforced by the Director of Public Health operating in this city and county at the present time.

A reading of the aforesaid provisions clearly established the absence of any expressed authority for the promulgation of orders having the efficacy of law. An analysis of the same indicates a similar situation because of the direction contained in Section 4, which reads that "the Board shall enforce all ordinances, rules and regulations which may be adopted by the Supervisors for the carrying out and enforcement of a good sanitary condition in the City and County; for the protection of the public health;xxx"

As a positive pronouncement against the right of your office to exercise the quasi-legislative function as is now under consideration, the closing part of this section dictates that the Board of Health "shall from time to time submit to the Supervisors a draft of such ordinances, rules and regulations as it may deem necessary to promote the objects mentioned in this section."

It therefore appears that it was not the intention of the charter framers that the Director of Public Health should have unlimited powers in the issuance of so-called executive orders in the matter of the protection of public health, but rather that he should issue such orders only when authorized to do so by ordinance of the Board of Supervisors. We realize that there is a line of earlier cases which frown upon the delegation of power by a legislative body to the executive or administrative branch of the government, but we believe that the trend of the later decisions is to permit such a delegation of powers, sometimes in the matter of the enforcement of specific rule adopted by the legislative body and again to enforce generally such rule as in the discretion of the administrative or executive branch as will carry out the general purposes of the legislative enactment.

See GAYLORD v. CITY OF PASADENA 175 Cal. 433
CARTER v. STEVENS et al 211 Cal. 281
In re Weisberg 215 Cal. 624
In re West 75 Cal. App 591
In re GRAHAM 93 Cal. 88

The cases above cited deal with the exercise of a discretion by an executive in enforcing specific regulations adopted

[illegible]

[illegible]

[illegible]

by the legislative branch of the government.

Recently however, the courts have broadened the rule to the end that a general grant of power by the legislative body to the executive for the purpose of regulating a specific matter has been sustained, especially where the matter regulated is one which may work harm to the general public.

See CITY OF SOUTH PASADENA v. CITY OF SAN GABRIEL
134 Cal. App. 403

In the instant case however, we have not been directed to any ordinance which confers upon the board of health or upon its Director of Public Health the authority contended for, and hence must conclude that a general order by the Director is ineffective.

This conclusion was recently annunciated by Judge James Conlan of our Superior Court in the case of GEROUX v. THE CITY AND COUNTY OF SAN FRANCISCH, which dealt with the use of certain meat preservatives.

Therefore we believe that you cannot prevent the distribution of the bread in question by an executive order

Thus we are brought face to face with a denial of authenticity to your Executive Order 107 and the only legal efficiency it possesses must be predicated upon the provisions of ordinance No. 1426 (New Series). The said order being a rather generous paraphrase of Section 5, of the referred to ordinance, its validity must be measured by and to the degree it coincides with the prohibitions found in the said ordinance; of itself there is no legal sanction for its existence.

Coming now to the validity of the label, the determination of this problem is entirely dependent upon the facts of the matter. If the statement found thereon is one which does not compare to the true situation then there is danger of punishment under the terms of ordinance No. 1426 (New Series)

It would appear to me that the expression "Avoid Constipation - The Natural Way" is of such a generic type as to fall within the category of trade exhortation or invitation rather than a positive declaration as would be assigned to statements such as "cure" or "relieve" constipation. I am inclined to agree with the ruling made by the Attorney General on this phase of our inquiry.

Trusting the foregoing will be of assistance in reconciling the divergent views engendered by this matter, I am,

Respectfully,

Director of Public Health. CITY ATTORNEY.

being

September 19, 1935.

SUBJECT: The Necessity of Filing a Copy of the Inventory and Appraisement in Estates of Decedents under Section 600 of the Probate Code.

Dear Sir:

In response to the question whether the filing of a copy of the inventory and appraisement, as required by Section 600 of the Probate Code, is mandatory, please be advised:

OPINION

The amendment, adopted in 1935, to Section 600 of the Probate Code inserts therein the following language, to-wit:

> "together with a copy of the same, which copy shall be transmitted by said clerk to the county assessor."

Section 600, insofar as it relates to the filing of the inventory and appraisement, now reads as follows:

> "the executor or administrator must file with the clerk of the court an inventory and appraisement of the estate of the decedent which has come to his possession or knowledge together with a copy of the same which copy shall be transmitted by said clerk to the county assessor."

In our opinion the word "must" relates not only to filing the original, but also to filing a copy of the inventory and appraisement. The direction is specific and mandatory and leaves no doubt as to the legislative intent to impose upon the executor or administrator the duty to file a copy with the original inventory and appraisement.

Because of the mandatory provisions in Section 600, as amended, the clerk of the court should refuse to receive and file the original inventory and appraisement unless it is accompanied by a copy of the same.

Respectfully,

CITY ATTORNEY

H. I. MULCREVY,
County Clerk

#5

[illegible] 19, 1950.

[illegible] The necessity of filing a copy of
the inventory and [illegible]
[illegible] of [illegible] [illegible]
[illegible] of the [illegible] [illegible].

Dear Sir:

In reference to the [illegible] [illegible] the filing of a copy
of the inventory and [illegible], as required by section [illegible] of
the [illegible] [illegible], is mandatory, [illegible] [illegible]

[illegible]

The [illegible], [illegible] in [illegible], [illegible] in the
[illegible] [illegible] [illegible] [illegible] [illegible]

"[illegible] [illegible] a copy of the [illegible], [illegible]
[illegible] be [illegible] by [illegible] [illegible] [illegible] [illegible]."

Section [illegible], however, [illegible] [illegible] [illegible] the filing of the
inventory and [illegible], [illegible] [illegible] [illegible] [illegible]

"The [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] of the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] of the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible]

September 16,1935.

SUBJECT: Appropriation of Funds from the Emergency Reserve Fund to the Grand Jury for the Purpose of Investigating Police Conditions in San Francisco.

Dear Sir:

I am in receipt of your request for an opinion of the proposition submitted to you by the Grand Jury of the City and County of San Francisco in the following letter, dated September 14,1935:

> "Pursuant to the provisions of Section 79 of the Charter, you are hereby requested to recommend to the Board of Supervisors an appropriation in the amount of twenty-five thousand dollars from the Emergency Reserve Fund for the uninterrupted operation of the Grand Jury, for the purpose of an investigation of the charges against Police officers."

OPINION:

The matter submitted has been passed on by both the District Court of Appeal and by the Supreme Court of the State of California in the proceedings entitled "Woody vs. Peairs, 35 Cal.App.553" and in "Allen vs. Payne", 1 Cal.(2d) 607. In both cases the courts held that charges incurred by a grand jury for the purpose of conducting investigations are not proper county charges.

The case of Allen vs. Payne,supra, was based upon a petition for a writ of mandate to compel the Auditor of Los Angeles County to approve a claim for services rendered by an investigator employed by the grand jury. The court in rendering its opinion says, of page 607:

> " The facts are undisputed, and the only question is one of law, whether the grand jury has the power to employ persons to investigate crime, and make the compensation of the investigators a charge upon the county."

On pages 608 and 609, the Court in arriving at its conclusion that the claim was improper states the law as follows:

[illegible] Editions.

[illegible] representatives of Italian firms [illegible] [illegible] Commercial Treaties [illegible] on the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] in the [illegible].

Dear Sir:

I am in receipt of your [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

"From the time of the adoption of our Constitution to the present, the accepted practice has been to leave the detection of crime in the hands of sheriffs and district attorneys, and in our opinion the departure from that practice finds no support in authority or legislative policy. The ferreting out of evidence of crime is a statutory duty expressly imposed upon certain officers, having the equipment and qualified personnel to perform it. This being so, there is no reason to resort to the very vague justification of 'inherent' or 'implied' powers. The existence of the power in other competent agencies tends to negative an implied power in the grand jury, which is obviously not equipped to exercise it. The grand jury's function of 'investigating' crime may be readily distinguished from detection.

This conclusion is reinforced by an examination of the legislative history of the grand jury in this state, in the light of established rules of statutory construction. That examination reveals a practice of defining and delimiting its powers in relation to employment, by express statutory grant. In the Statutes of 1871-72, page 540, is found an express grant of power to the grand jury to employ and compensate interpreters; in 1880, Penal Code section 928 first authorized the employment of auditors; in 1897, section 925 of said code was amended to provide for a stenographic reporter when requested by the district attorney; and in 1927, section 925 was amended to permit the attorney-general, upon request by the grand jury, to employ special counsel and investigators. It seems clear from these instances that the legislature has considered the employment of persons by the grand jury a matter to be governed by statute. In none of these cases would there have been any necessity for a grant of authority if there existed the implied power which is claimed for the body by petitioner.

There seems to be no case directly in point, but several expressions in the decisions support the views above stated. (Woody v. Peairs, 35 Cal.App.553 (170 Pac.660); Burns Int. Detective Agency v. Doyle, 46 Nev.91 (208 Pac.427,26A.L.R. 600); see Dession & Cohen, The Inquisitorial Functions of Grand Juries, 41 Yale,L.J. 868.) "

We are of the opinion, however, that while the money sought may not be appropriated to the grand jury, it may be appropriated to the District Attorney for the purposes of the investigation, upon his request and your approval and the vote of three-fourths of the members of the Board of Supervisors, as required by Section 79 of the Charter, provided that the same is found necessary for the immediate necessary preservation of public peace, property, health or safety, or for making provision for the uninterrupted operation of any city and county department or office, as required by section 16 of the Charter.

Respectfully,

City Attorney

To-
THE MAYOR.

#5

We are of the opinion, however, that while the money sought may not be appropriated to the grand jury, it may be appropriated to the District Attorney for the purposes of the investigation, upon his request and your approval and the vote of three-fourths of the members of the Board of Supervisors, as required by Section 73 of the Charter, provided that the same is found necessary for the immediate preservation of public peace, property, health or safety, or for making provision for the uninterrupted operation of any city and county department or office, as required by section 16 of the Charter.

Respectfully,

City Attorney

To-
THE MAYOR.

WS

September 18, 1935.

SUBJECT: In Re: Contract for Improvement of Streets in the Crocker Amazon Tract.

Dear Sir:

I have your communication reading as follows:

"Under date of November 13, 1928, the following Journal resolution was adopted by the Board of Supervisors:

'RESOLUTION

'Whereas, certain streets in the Crocker-Amazon, Forest Hill and Forest Hill Extension Tracts have never been accepted by the City and County of San Francisco, and as a consequence thereof no repairs or cleaning can be done by the Department ofPublic Works; now, therefore, be it

'Resolved, that this Board of Supervisors declare as its policy, if legal means can be found, the acceptance of these streets, and that the Committee on Streets and Commercial Development be authorized to prepare, in conjunction with the City Attorney, the necessary legislation to legalize the acceptance of said streets; and be it

'Further Resolved, That as soon as said legislation is prepared and adopted, that the Board of Public Works be requested to recommend to this Board that said streets be accepted by the City and County of San Francisco.

Motion.

Supervisor Gallagher moved adoption.

Privilege of the Floor.

Assistant City Engineer Healy declared that the Board of Public Works did not recommend the acceptance of these streets, but would be in favor of the compromise proposed by former Supervisor Harrelson that the property owners and the City share fifty fifty the expense of reconditioning the streets, whereupon the Board of Public Works would recommend

acceptance.

Amendment.

Supervisor Colman, seconded by Supervisor Hayden, moved as an amendment that Assistant City Engineer Healy's proposition that the property owners and the City share fifty-fifty the expense of reconditioning streets in the Crocker-Amazon Tract be accepted.
Amendment carried by the following vote:
Ayes - Supervisors Andriano, Colman, Havenner, Hayden, McSheehy, Marks, Shannon, Stanton, Todd, Toner - 10.
Noes - Supervisors Gallagher, Kent, Powers, Roncovieri, Suhr - 5.
Excused from voting - Supervisors Mc Govern - 1.
Absent - Supervisors Peasy, Schmidt - 2. '

"Subsequent to the passage of the above journal resolution by the Board of Supervisors James T. Tobin, one of our local contractors, immediately proceeded and signed up by private contract virtually the entire Crocker Amazon district. From time to time application was made to the Department of Public Works for permits and as money became available to pay the City's portion (the Resolution providing the expense was to be borne 50% by the City and 50% by the property owners) permits were given to Mr. Tobin, work was performed and the streets accepted.

"At the present time there are several applications from Mr. James T. Tobin on file in this office, permits not being granted for the reason there was no available money for the City's portion.

"In the annual appropriation ordinance of 1935-36, page 55, app. 548.954.00, there is set up an item recondition streets Crocker Amazon Tract (Tobin, contractor) $6700.00.

"Will you kindly advise the Director of Public Works whether or not we can issue the necessary permits to Mr. Tobin for the private property owners' portion and an order for work covering the City's portion. Inasmuch as the work involved is over $1000.00 we are hesitant about following procedure as in the past. I might state that since the adoption of the new charter in 1933 orders for work in the amount of $4526.00 were approved by the Controller. Therefore, we respectfully request your opinion as to whether or not we can follow the same procedure as followed in August 1933."

OPINION

It is quite true, as you state in your letter, that Section 95 of the Charter provides that where the contract exceeds the sum of $1,000.00, a contract can only be entered into after competitive bidding. However, this provision applies only to contracts which are actually entered into subsequent to the effective date of the present charter.

Section 2 of the Charter provides:

> "All ordinances or resolutions in force at the time this charter takes effect and not inconsistent therewith shall continue in force until amended or repealed. All public improvements or other proceedings legally authorized under the charter superseded by this charter shall be carried to completion under previously existing laws or under this charter."

It would appear to me that the proceedings taken by the Board of Supervisors prior to the adoption of the present charter and which are set forth in your communication, would indicate that a contract was really entered into between the property owners of the Crocker Amazon Tract and the City that the public streets in this Tract would be reconditioned, the property owners to pay one-half of the cost thereof and the City to pay the remaining one-half thereof.

In other words, if the City, by motion or resolution of the Board of Supervisors, agreed to such a proceeding and the property owners proceeded to carry out their portion of the agreement, the City would be bound to perform its part of the bargain. That such was the intention is indicated by the fact that, from time to time, the City has made appropriations to meet its portion of the obligation and in the current year's appropriation ordinance I find Item No. 548.954.00 for $6,700.00 for reconditioning streets Crocker Amazon Tract, Tobin contract.

It is therefore apparent that even as late as the current year it has been the intention of the Board of Supervisors to abide by the agreement made in 1928. This being the case it would appear to me that it would be practically impossible to call for bids for the doing of this work as it would be extremely difficult to say which particular portion of the work should be done by the property owners and which particular portion should be done by the City, and if either party were to do the work separately it would certainly increase the cost thereof.

Furthermore, I am of the opinion that as long as the appropriation has been made for the current year's expenditure, you should look upon the contract between the property owners and the City as still existing and when any specific amount of work has been com-

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[illegible]

[illegible]

pleted in accordance with the terms of the existing agreement, one-half the cost thereof should be paid provided, of course, that in your opinion the work is properly done and the charges for so doing are reasonable and the amount to be paid comes within the amount of the appropriation.

I would suggest, however, that before permitting the property owners to proceed with any work, you assure yourself that the specifications for doing the work meet with your approval and that the Controller certifies that the cost thereof will be available upon the completion of the work.

Very truly yours,

CITY ATTORNEY.

#1

To -
Director, Department of Public Works.

Copy to -
Controller.

September 25, 1935.

SUBJECT: Is Amendment to Section 3649 of the Political Code Changing the Date of Delinquency for Taxes on Unsecured Personal Property Retroactive insofar as it Advances the Date of Delinquency for the Payment of Taxes on said Property?

Dear Sir:

You have submitted to this office the question whether the amendment to Section 3649 of the Political Code becomes effective ninety days from the adjournment of the last session of the State Legislature or will it be effective on September 1st of the current year, and, in general, what is the immediate effect of the Amendment written into this Section.

The Controller also asks for the same information and also to be advised as to whether the section applies only to unsecured personal property which has escaped taxation or to all personal property the taxes on which are not a lien upon real property.

OPINION.

The legislation amending the section mentioned was not passed as an emergency measure and therefore, under the provisions of Section 1, Article IV of the Constitution, it shall become effective ninety days after the final adjournment of the session of the Legislature which passed it. In other words, it became effective on September 15th of the present year.

The section deals generally with the assessment of unsecured personal property which has escaped taxation or which has not been declared to the Assessor by the owner thereof. The third paragraph of the section, however, appears to advance the delinquency date for the payment of taxes on all unsecured personal property from December 5th to September 1st. This paragraph reads as follows:

> "Taxes on all personal property not secured by real estate shall become delinquent on the first day in September, regardless of whether or not the property was discovered and assessed prior to or after said date, and thereupon a penalty equal to eight percent shall attach to the tax so levied and no further penalty shall be added to said taxes."

Section 3 of the Political Code provides that no part of that Code shall be retroactive unless especially made so. There is no express language in Section 3649 which gives to the provi-

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sions of that section any retroactive effect. The Supreme Court, in PIGNATZ vs. BURNETT, 119 Cal. 157, has said:

> "Laws which create new obligations, or impose new duties, or exact new penalties because of past transactions, have been universally reprobated by civil and common law writers, and it is to be presumed that no statute is intended to have such effect unless the contrary clearly appears. This is especially so where to give the statute retrospective effect would work manifest injustice. Existing laws, it is said, enter into and become part and parcel of contracts to which they are applicable. How obvious it is, therefore, that all should be able to contract obligations with knowledge of the laws which thus enter into them."

In the case of BODGE vs. NEVADA NATIONAL BANK, 109 Fed. Rep. 727, a state of facts very similar to the matter involved in the present inquiry was before the Court. The facts were as follows:

At the time of the passage of the Act, taxes for the current year had attached to property at 12 o'clock noon on the first Monday in March. During the session of the legislature of that year a law was passed which made shares in national banks subject to taxation. The law was passed by both houses of the legislature in due time so that, in the ordinary course of events, it would have been effective on the first Monday in March. However, by reason of the failure of the governor to act upon the law, it did not become effective until March 14th. The bank contended that its shares were not taxable for the reason that the Act was not in effect on the first Monday in March when the tax lien would have attached as provided by law. In disposing of the case and holding that the law was not retroactive and therefore the tax did not attach for that year, the United States Circuit Court of Appeal said:

> "Was the statute operative to affect the levy and assessment of property for the year 1899? The rule is elementary that a statute can only become operative at a time and in the manner prescribed by the constitution. It is therefore manifest that the statute in question had no binding force or effect whatever prior to March 14, 1899. Undoubtedly the bill was introduced to remedy the defects in prior acts, so that the shares of national banks might be legally taxed. This was the object, intent, and purpose of the bill, as introduced in the legislature. But, in order to accomplish this intent, it was necessary that it should become a law on or before the first Monday in March. Of course, if the governor had approved the bill before that date, the question we have in hand would not have appeared, to worry 'either

court or counsel.' But the mere fact that the supporters of the bill intended to have it passed in time for it to be approved by the governor, so as to become a law before the first Monday in March, does not show, or tend to show, that the legislature intended to make the law retroactive. It proves, if it proves anything, just the contrary. The bill was drawn to take effect immediately when it became a law. It did not become a law until March 14th. It therefore matters not what the intention of the legislature may have been when the bill was introduced. If it was, as we have supposed, to have it passed and approved so as to become a law prior to the first Monday in March, in order to avoid the question here raised, the legislature failed to carry out its intention in that direction."

Further, as tax proceedings are in invitum, laws providing for a tax or regulating the collection thereof are strictly construed in favor of the taxpayer and against the State. Strict construction is in all such cases reasonable because, presumptively, the legislature has given in plain terms all of the power it intended to be exercised. See 24 CAL.JUR. page 27.

Prior to the amendment of the current year, Section 3649 did not provide any penalty for delinquency for the non-payment of taxes on the property referred to in the section, but it did provide a penalty for failure to make a return of the property to the Assessor within the time required by law. This penalty was ten percent of the tax levied upon the property. The amendment removes the penalty for failure to return but advances the date of delinquency from December 5th to September 1st, which latter date of delinquency is provided for in Section 3756 of the Political Code.

The advanced delinquent date being September 1st, and the amendment itself not becoming effective until September 15th, a burden upon the taxpayer is created which did not exist prior to the effective date of the amendment and such a burden cannot be made retroactive unless the statute expressly provides for the retroaction. It therefore appears to me that the advanced date of delinquency cannot be effective for the current year.

This brings us to the questions as to the effective date of the remaining provisions of the section and what penalty, if any, should be imposed for delinquency and when the penalty attaches.

The provisions relative to the assessment of escaped or undeclared property are undoubtedly effective as of September 15th and the assessment of such property on and after that date must be made in accordance with the amending provisions of the Section.

The ten percent penalty for failure to return or declare property with the Assessor is no longer in force and property which has escaped assessment during the preceding year must hereafter be

assessed as provided in the section as amended.

This leaves us the question as to what penalty will attach for delinquency in the payment of taxes on unsecured personal property and the date when it will attach. Section 3756 of the Political Code regulates generally the time for the payment of taxes. This section has not been changed by the laws of the current year and according to its terms the penalty for delinquency on all personal property attaches at 5 o'clock P.M. on December 5th of each year.

While the amendment to Section 3649 which is here under discussion advances the date of delinquency, this advance, as we have already said, is not effective for the current year. Without determining whether Section 3649 will, in future years, repeal the provisions of Section 3756 as to the date of delinquency of taxes on all unsecured personal property, I am of the opinion that it does not do so for the current year for it is clear, from the provisions of Section 3649, that the Legislature intended that a penalty should still attach for delinquency but as this penalty, which would take the place of the penalty provided for in Section 3756, could not be made effective on September 1st it did not take the place of the existing penalty for the current year. Therefore, until the penalty provided for in Section 3649 is effective, the existing penalty should stand, especially as the tax had attached when the last named section became effective.

The above reasoning is supported by a line of decisions both in the courts of California as well as from other jurisdictions. See CITY OF OAKLAND vs. WHIPPLE, et al, 44 Cal. 303 where the Court said:

> "The Act of 1870 provides, among other things, that the Tax Collector shall complete the 'delinquent list' on the Saturday next preceding the third Monday in December of each year; and that after the list shall have been published, as prescribed in the Act, the Tax Collector shall proceed to collect the delinquent taxes, in the manner prescribed by law for the collection of delinquent taxes in the City and County of San Francisco. It was impossible for the officers to proceed, under the Act of 1870, with the collection of the taxes for the year 1869, because the time for the performance of several of the duties prescribed by that Act, and the law for the collection of delinquent taxes in San Francisco had already elapsed when the Act of 1870 was passed. To hold that the Act was intended to have a retrospective operation, so as to affect taxes which had already become due, would be to hold that the Legislature intended to remit all those taxes. A result so manifestly incompatible with the plainest provisions of the Constitution, would not be inferred, but must be made apparent by clear and

the tax had attached when

unequivocal language. That construction is not necessary in order to give full effect to the Act, and, in our opinion, it was not intended that the Act should have a retrospective operation; but the intent was that the taxes then due should be collected according to the law then in force."

See also: ESTATE OF LANDER, 6 Cal.App. 744;
FLANIGAN vs. SIERRA CO., 122 Fed. 24.

You are therefore advised that, for the current year, the penalties provided for in Section 3756 of the Political Code will apply.

It is not necessary to determine at this time whether Section 3649 applies to all unsecured personal property or is limited only to property which has escaped taxation. The language of the section in this particular regard is extremely uncertain and this question will be reserved for further investigation.

Very truly yours,

CITY ATTORNEY

To the -
Assessor.

Copy to -
The Controller,
Bureau of Delinquent Revenue.

#1

October 4, 1935.

SUBJECT: In Re, Collection of License Fees after Repeal of Ordinance Authorizing same.

Dear Sir:

The head of your License Department has asked what power you have to collect delinquent licenses after the ordinance authorizing said licenses has been repealed or amended, the question having arisen as to the right to collect licensesfees from hotel owners for the quarter commencing July 1st, 1935, when the ordinance authorizing these licenses was amended since that date, which amendment became effective on August 12th of the present year.

OPINION

Section 89 of Ordinance No. 5132 (New Series) authorized the collection of certain licenses from owners, agents, managers or keepers of hotels and the amounts of these licenses were based upon the gross receipts from the hotel. This ordinance is commonly known as the License Ordinance. On July 8th of the present year Section 89 of this ordinance was amended by providing that each person operating an hotel should pay a flat license fee of $3.00 per quarter.

As above noted, this ordinance became effective on August 12th. Section 2 of the amending ordinance provided that"all ordinances and parts of ordinances in conflict herewith are hereby repealed." The ordinance is not made retroactive by its terms and the question therefore arises, not only as to the right of your License Department to collect delinquent licenses under the old ordinance, but also what licenses should be collected for the period between July 1st and the effective date of the amending ordinance.

It is a well settled principle of law that when an ordinance which imposes a license is repealed or amended to such an extent that the amending ordinance is practically a repeal of the original ordinance, it is not possible to collect any amounts under the old ordinance which amounts have not been reduced to a final judgment.

The Supreme Court of this State has, on more than one occasion, given expression to this principle of law. In the case of SPEARS v. COUNTY OF MODOC, 101 Cal. 303, the facts were as follows:

The plaintiff was convicted in the Justice's Court on January 27, 1890, of violating an ordinance of the County of Modoc forbidding the keeping of a saloon where spirituous liquors were sold and judgment was entered against him that he pay a fine of $500.00 or be imprisoned in the County Jail of the County of Modoc for a period of one day for each dollar of said fine or until such fine be satisfied. The plaintiff appealed from the judgment of conviction and, before the hearing of the appeal, the ordinance under which the conviction was had was repealed, the repeal taking effect on January 24, 1891. The Court said:

> "The effectof repealing a statute is to obliterate it as completely from the records as if it had never passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law. This principle has been applied more frequently to penal statutes, and it may be regarded as an established rule that the repeal of a penal statute without any saving clause has the effect to deprive the court in which any prosecution under the statute is pending of allpower to proceed further in the matter. * * * * * * If a penal statute is repealed pending an appeal, and before the final action of the appellate court, it will prevent an affirmance of a conviction, and the prosecution must be dismissed, or judgment reversed. * * * * * * *
>
> "* * *It is well settled that no judgment can be rendered in an action to enforce a penalty when the statute under which the proceeding is had has been repealed."

The same rule is extended as to the right of the license levying power to bring a civil suit to recover the amount of the license taxes.

See: CITY OF SONORA v. CURTIN, 137 Cal. 583.

In this case the City of Sonora enacted an ordinance providing for the payment of a license fee by all attorneys practicing within the city. This license ordinance, while not directly repealed, was rendered void by the passage of a State law in 1901 which took away from cities the right to license for revenue. In disposing of the matter the Supreme Court said:

> "The right is given by the ordinance to bring a civil suit to recover the amount so made a license tax. This civil remedy was created by the ordinance, and the remedy is repealed by the repeal of the ordinance as to revenue."

In NAPA STATE HOSPITAL v. FLAHERTY, 134 Cal. 315, the facts were as follows:

By the law of 1899 certain kindred of an insane person committed to the State Hospital were responsible for the care of the patient. In 1907 a new act was passed which did not give to the State the right to recover against the relatives of the insane person. The Court said:

> "It is a rule of almost universal application that, where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession, or perfected by final judgment, the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause."

For additional California authorities on the same subject see:

> FREEMAN v. GLEN COUNTY TELEPHONE CO., 184 Cal. 508;
> MOSS, et al, v. SMITH, 171 Cal. 777.

The same rule has been followed in other jurisdictions. See:

TROY v. CITY OF ST. PAUL, 193 N.W. 726, in which it was said:

> "It was admitted at the argument that on November 16, 1922, while the appeal was pending, section 674 of the Building Ordinance was amended by striking out the provision relating to the property owners' consent and substituting a provision requiring the affirmative vote of five sevenths of the members of the council to authorize the issuance of the permit * * * *"
>
> "With practical unanimity the courts hold that where a suit is founded on a statute, and before the suit has been concluded or vested rights have been acquired, the statute is repealed without attaching a saving clause to the repealling act, the suit must stop where the repeal finds it * * * * * The same principle applies to an ordinance which has been repealed."

While in the instant case there is an express provision in the amending ordinance that all conflicting ordinances are repealed, I am of the opinion that the rule announced in the above cited cases will also apply where there is no express repeal but where there is a repeal by implication - that is, when the amending ordinance is so conflicting with the original ordinance that

the provisions of both cannot be enforced.

In the case of CITY OF ST. LOUIS v. KELLMAN, 139 S.W. 443, the Supreme Court of Missouri said:

> "What does the word 'repeal' mean when used by law-maker or judge? 'Repeal' is defined as the abrogation or annulling of a previously existing law by the enactment of a subsequent statute, which either declares that the former law shall be revoked and abrogated, or which contains provisions so contrary to or irreconcilable with those of the earlier law that only one of them can stand in force."

In the case of UNITED STATES v. TYNEN, 20 Law Ed. 153, Justice Field, speaking for the Supreme Court of the United States said:

> "There is no express repeal of the 13th section of the Act of 1813 declared by the Act of 1870, and it is a familiar doctrine that repeals by implication are not favored. When there are two acts upon the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act <u>without the repealing clause</u> operates to the extent of the repugnancy as a repeal of the first; and even where the two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of the act."

In STATE v. SECOND DISTRICT COURT, 287 Pac. 957, the Supreme Court of Nevada has expressed itself upon the subject as follows:

> "The implied repeal of a statute takes place when the new law contains provisions contrary to those of the former law without expressly repealing the same."

While Ordinance No. 5132 (New Series)called the License Ordinance, by Section 92 thereof repeals Ordinance No. 3361 and all conflicting ordinances, it contains a saving clause to the effect that the repeal would in no way affect pending actions or proceedings. No such saving clause is contained in the ordinance amending Section 89 of the License Ordinance - that is, there is nothing in it which would provide that any rights acquired by the city under the old ordinance would continue after its repeal.

the provisions of that section be followed.

In the case of City of St. Louis v. Dickson, 141 S.W. 447, the Supreme Court of Missouri said:

"Some doubt has been raised [illegible] [illegible] [illegible]

You are therefore advised that, in my opinion, it is not possible to collect either license fees or penalties thereon under Section 89 of Ordinance No. 5132 (New Series) as it existed prior to the amendment of July 8, 1935.

This brings us to the question as to for what period of time the license fees under the amending ordinance should be collected. Although the ordinance was passed on July 8th, it being an ordinance subject to referendum, it did not become effective until thirty days after its approval by the Mayor. See Charter, Section 179.

True, the repeal of Section 89 of the original ordinance did not become effective until the effective date of the amendatory ordinance and therefore any amounts collected between the 1st of July and the effective date of the amending ordinance were properly collected and remain the property of the city but, as I have already said, amounts which remain unpaid under the old ordinance cannot now be collected.

Under Section 2 of the License Ordinance all licenses are payable quarterly and, while the amendment to Section 89 is not by its express terms made retroactive, it would appear that it was the intention of the Board of Supervisors to provide that the licenses should be paid for the quarter commencing July 1st and ending September 30th, but as the ordinance did not become effective until the 12th day of August no penalty can be imposed for the delinquency until thirty days after the effective date. Therefore, licenses which were not paid by September 11th but which are paid within thirty days thereafter are, according to Section 2 of the License Ordinance, subject to a penalty of ten percent; and if they are not paid within the additional thirty day period they are subject to the additional penalties provided for in said Section 2.

You are advised accordingly.

Very truly yours,

CITY ATTORNEY.

To the -
Tax Collector.
Copy to the -
Controller.

#1

October 4,1935.

SUBJECT: The Statement "A Natural Food with a Laxative Effect" on a Bread Wrapper Presents a Question of Fact to be Passed upon by the Director of Health.

Dear Sir:

You have submitted to me a question as to the legality of a certain wrapper used on bread manufactured in Los Angeles and carrying the statement " a natural food with a laxative effect". My opinion is asked because of an inquiry made of you by the manufacturers as to their right to use the aforesaid wrapper on such commodity to be sold in this City and County.

OPINION.

In my advice to you under date of August 20,1935, concerni a similar kind of advertising statement, at the close of the page you will find this expression:

> "Coming to the validity of the label, the determination of this problem is entirely dependent upon the facts of the matter. If the statement found thereon is one which does not comport to the true situation then there is no danger of punishment under the terms of ordinance No.1426 (New Series)."

In other words, is the statement on the wrapper reading "A natural food with a laxative effect", one which falls within the definition of "misbranded" as set forth in Section 5, of the aforesaid ordinance, or is it one deemed "mislabeled" or "misbranded" according to the standards announced in Section 6, of the same law. If so, it is violative of the enactment and subjects the manufacturer to prosecution.

This is a factual situation to be investigated and passed upon by your office and, such being the case, I am not in a position to predetermine the matter.

Respectfully,

City Attorney.

DIRECTOR OF PUBLIC HEALTH.

[illegible]

[illegible] The statement is intended that the
a negative interest in a [illegible]
[illegible] a decision of fact [illegible]
[illegible] upon by the [illegible] of [illegible].

Dear Sir:

You have submitted to me a question as to the legality of a certain stamper used on [illegible] in the letting and awarding the statement " a [illegible] from [illegible] a [illegible] [illegible] to [illegible] [illegible] [illegible]

October 7th, 1935.

SUBJECT: 1. Power of the Director for Joint Highway District to levy Taxes or issue bonds against Property located in a particular County within the District.

2. Power of the City and County to financially participate in building a Highway in another County.

Gentlemen:

Your request, dated September 30, 1935, for an opinion, at hand.

REQUEST

"On motion of Supervisor Colman, seconded by Supervisor Gallagher, you are respectfully requested to furnish the Board of Supervisors the following information:

"THAT the City Attorney advise this Board as to the powers of a highway district with particular regard to its power to either levy assessments or levy taxes against the City and County of San Francisco; also, the City Attorney to advise us if there is any other legal way in which San Francisco can aid by its financial participation in the building of highways in other counties."

OPINION

The foregoing request submits two questions:

1. Power of the Director for Joint Highway District to levy taxes or issue bonds against property located in a particular county within the District.

The power to create a joint highway district is set up under the "Joint Highway District Act", Act 3269, General Laws (1931) page 1549. Section 3 of this Act enumerates, among the general powers granted, the power:

"To levy and impose taxes and assessment taxes upon property within the boundaries of the district and issue bonds as in this act provided."

Section 9 of this Act provides that:

[illegible]

[illegible]

[illegible]

"Immediately following the organization of any joint highway district under this act, it shall be the duty of the several boards of supervisors of the counties composing such district to provide such district with a sufficient contingent fund to enable such district and its officers to perform the functions and duties in this act prescribed. The proportionate contributions of the several counties within the district may be suggested to the several boards of supervisors thereof by the board of directors of the district and the board of directors shall from time to time report to said boards of supervisors its requirements and in general its expenditures. The boards of supervisors of the counties within the district may contribute to said contingent fund from any moneys or funds of the several counties not otherwise appropriated, including any moneys received by such counties as a result of any tax or license upon motor vehicles or motor vehicle fuels, whether the same are received through the state of California, or otherwise."

Section 11 provides that the district engineer, having made a preliminary survey and estimate of the cost of construction, shall:

"* * recomend an apportionment of the construction and other costs among the several counties that are members of the district and the state of California, if any contribution is to be requested from the state. The district engineer shall also in his project recommend a method or methods for financing the project. Upon the completion of said report the district engineer shall cause the same to be filed with the secretary of the board of directors of the district."

Section 12 provides that the Board of Directors formulate a report, after the report of the District Engineer, which shall contain, among other statements, the statement required by Subdivision 8 of Paragraph 12, which reads as follows:

"A statement of the proportionate amounts of the cost of the unit or units proposed to be borne within the several counties composing the district, after deducting the contribution of the state of California, if any."

After the Department of Public Works of the State of California has reported its actions, the Board of Directors of the Highway District (Section 14) must then transmit certified copies of the preliminary report to the several boards of supervisors of the counties composing the district, who must accept or reject the report within sixty days. Failure to act shall be deemed a rejection.

Section 15 of the Act deals with the limitation of the

liability on counties and reads as follows:

"Limit on obligation of counties and state. No county within any district organized under the provisions of this act shall be obligated or committed hereunder unless and until the board of supervisors thereof shall have approved the report of the board of directors of the district provided for in section 12 hereof and unless and until said report shall have been approved by the boards of supervisors of all other counties in the district. The proportions of contribution provided for in said report shall not be exceeded without the consent of the board of supervisors of each county in the district."

From the foregoing we must conclude that the Board of Directors of the Joint Highway District is restricted in the matter of levying taxes or issuing bonds against property in any county, to the amount approved by the Board of Supervisors in that county when the certified copy of the report of the Directors of the Joint Highway District is submitted for adoption.

This limitation is further restricted by Section 28 of the Act which reads as follows:

"Limitation on indebtedness. No bonds shall be issued by any district hereafter organized or reorganized under the provisions of this act in an amount which will aggregate at any time an obligation in excess of ten per centum (10%) of the assessed value of the aggregate total taxable property within the district as shown by the then current taxation assessment-rolls of the several counties within the district. The taxable property within any county shall not at any time be obligated for all joint highway district purposes, in any amount in excess of the following limitations, viz: in counties having a total assessed value of all taxable property therein of one hundred million dollars or less, not more than three per cent thereof; in counties having a total assessed value of all taxable property therein of more than one hundred million dollars, the ratio shall be not more than two per cent thereof."

The protection to a county, after joining in the formation of a Joint Highway District, rests in the power of the Board of Supervisors of each County to reject the report of the Directors of the Joint Highway District.

It would appear, however, that the contingent fund for preliminary organization, surveys, etc., as required by Sections 9 and 10 of this Act, must be made up by the Boards of Supervisors of the counties constituting the district and that the proportionate amounts may be suggested by the Board of Directors of the

Joint Highway District.

As heretofore stated, any Board of Supervisors may reject the final report. If accepted, the property within the county may be subjected to taxation or bonded in accordance with the provisions of the Act.

Referring to your second question:

2. Power of the City and County to financially participate in building a highway in another county.

The power and authority of the City and County of San Francisco to financially participate in the building of a highway outside the limits of the City and County, is set forth in Section 2 of the Charter, as follows:

> "The city and county * * * * * shall have all rights and powers appropriate to a county, a city, and a city and county, subject only to the restrictions and limitations provided in this charter, including the power to acquire and construct plants, works, utilities, areas, highways and institutions outside the boundaries of the city and county, and maintenance and operation of the same, and the exercise of functions or maintenance of services outside the boundaries of the city and county, including the expenditure of funds therefor through any agency."

We are of the opinion that, under the powers set forth in the foregoing section of the charter, the Board of Supervisors may appropriate funds to be expended on a highway outside the City and County when the highway is found to be for the convenience and common good of the citizens of the City and County of San Francisco and may select the organization or agency conducting the project, as the agency through which said funds shall be expended.

Respectfully submitted,

CITY ATTORNEY.

To the -
Board of Supervisors.

#5

October 8, 1935.

SUBJECT: Payment of Salary to Teachers for Extra Services.

Gentlemen:

This office is in receipt of your request for an opinion, as follows:

REQUEST

Has the Board of Education the right to employ teachers for physical education and corrective classes, etc. after the usual and regular school hours and to compensate them for such services, and, if so, must such persons be paid by one salary warrant?

OPINION

Section 135 of the charter provides that the Board of Education shall have the power to employ such teachers and other persons as may be necessary to carry into effect its powers and duties and to fix, alter and approve their salaries and compensations. This language in Section 135 is extensive in scope and gives the Board of Education full power with respect to salaries and employment, except where the charter provides otherwise.

I have examined the charter and find nothing in it which would in anywise limit the Board of Education in its employment of teachers for the purpose of doing work other than regular ordinary routine work.

Under the circumstances, it is my opinion that the Board of Education has full power and authority to employ persons mentioned in the request. Whether these persons receive one pay warrant or two pay warrants is immaterial. The issuance of pay warrants is merely a matter of bookkeeping and can be arranged between the Board of Education and the Controller.

Respectfully submitted,

CITY ATTORNEY

BOARD OF EDUCATION

#3

[illegible] 3, 1960.

[illegible]: Proposal of Ballog to Treasury
for Sales Incentive.

[illegible]:

This office is in receipt of your request for an opinion, it

[illegible]:

[illegible]

Sir: The issue of [illegible] the right to [illegible] Treasury for
[illegible] educational and [illegible] institutions, after the [illegible] and
[illegible] [illegible] have had to demonstrate that the [illegible] activities, such as
[illegible], [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible]

Section 103 of the [illegible] [illegible] [illegible] [illegible] of [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

October 26,1933.

SUBJECT: Regulation of Sale and Handling of
Poultry and Fish - Exemptions
Granted Kosher Markets.

Gentlemen:

Enclosed herewith is copy of ordinance regulating the hours for the sale of poultry and fish, and providing that the Director of Health shall make rules and regulations concerning refrigeration thereof, which has been submitted to this office for criticism.

OPINION.

It is my opinion that the sale of poultry and fish may be regulated so far as the hours of sale and refrigeration thereof is concerned. This, of course, must be done in a reasonable manner and have as its basis sufficient facts to sustain said ordinance if attacked.

The fact that food inspectors are on duty at certain hours only would be sufficient to authorize regulation of sale to those hours and, of course, the necessity of refrigeration as a health measure cannot be questioned.

In re Lowenthal, 92 Cal.App.200.

However, I cannot approve of the exemption granted in said ordinance to the sale of poultry and fish by kosher markets at times other than allowed non-kosher markets.

Judge Walter Perry Johnson wrote a very learned opinion in the Superior Court in the case of IN RE GATSIOS, in which he held that the exemption granted kosher markets under the prevailing meat ordinance was unconstitutional and void, but that the ordinance as a whole was not affected thereby and that the hours of sale of meats could be regulated to those hours when meat inspectors were on duty.

This decision of Judge Johnson was appealed from and the District Court of Appeals, First Appellate District, Division One, on December 26,1928, handed down a decision sustaining Judge Johnson's ruling in IN RE GATSIOS, 95 Cal.App. 762.

In order to grant kosher markets the exemption set forth in this ordinance it will be necessary for this Board to find from sufficient testimony, which will withstand attack in any court, and there is something inherent in the manner of killing and handling kosher poultry and fish which renders such commodities so killed and handled less immune to bacteria attack and deterioration than under the gentile system. Unless and until your Board is convinced that kosher poultry and fish keep better because of the fact that it is kosher, it is my opinion that said exemption be stricken therefrom. Courts do not and could not consider

[illegible]

[illegible]

[illegible]

religious principles, practices, or inconveniences. The only basis upon which such an ordinance could be upheld must be that it promotes the public health.

I cannot agree with the contention made because only kosher poultry and fish will be handled in such places there is a distinction between these facts and those decided in IN RE GATSIOS.

Respectfully,

City Attorney.

HEALTH COMMITTEE,
BOARD OF SUPERVISORS.

November 1, 1935.

SUBJECT: In Re: Recordation of Agreements for Sale of Real Property.

Dear Sir:

I have your request for an opinion under recent date as to whether your Department should accept for recordation "Agreements for Sale of Real Property" when same are signed by vendor and vendee, but acknowledged by vendee alone.

OPINION

An instrument executed by more than one person, but not acknowledged by all of them, is entitled to be recorded but should be treated, for the purpose of recordation, as the act only of those persons who acknowledged it.

22 CAL. JUR., Sec. 18, p. 602.

In the case of KIESE v. BEARDSLEY, 190 Cal. 465, 213 Pac. 500, it was held that acknowledgment by the vendees alone under a contract of purchase of real property is insufficient to give the successor of the vendor the constructive notice which would otherwise result from the recordation after proper acknowledgment by the vendor.

The case of PEOPLE v. DONEGAN, 226 N.Y. 84 (123 N.E. 71), on mandamus, deals with the duty of a registrar where one of four grantors in a deed failed to acknowledge it in a proper manner. The law of New York with reference to recordation is substantially the same as of this state. SEC. 1161, CIVIL CODE.

The New York statute provides that:

> "A conveyance of real property within the state, on being duly acknowledged by the person executing the same * * * may be rendered in the office of the clerk of the county where such real property is situated."

The court of appeal of New York held that it was the duty of the Registrar to record the instrument but not to index it in the na e of the grantor who failed to acknowledge it. In short, that it should be treated for the purpose of recordation as the act only of those persons who acknowledge it. This decision is in accord with our own decision (FRESNO CANAL, etc. CO. v. ROWELL, 80 Cal. 114, 117, 22 Pac. 53.)

See also:

BILL v. SAGE, 60 Cal.App. 149;
DU ROSS v. TRAINOR, 122 Cal.App. 732;
MAYHEW v. MELEY, 206 Cal. 396;
WILLSTON v. CITY OF YUBA CO., 1 Cal. App. (2d) 166.

It is therefore my opinion that when an instrument, acknowledged only by some of the parties who have executed it, is presented to you for recordation you should record it. Although as against those who have not acknowledged it, its recordation may not give even constructive notice of its content, those who have acknowledged it are entitled to have it recorded. The effect of this recording need not be determined by you.

Very truly yours,

CITY ATTORNEY.

To the -
Recorder.

#8

November 4,1935.

SUBJECT: Maintaining Automobile
Wrecking Business in a
Commercial District.

Dear Sir:

I have your request that I advise you if premises situated in a light commercial district may be used for the purpose of conducting therein the business of wrecking automobiles.

OPINION.

On December 5,1932, I advised your Commission that an automobile paint shop which was not connected with a public garage could not be maintained in a light commercial district; basing my opinion upon Section 5 of the Zoning Ordinance expressly providing that an automobile repair shop unless connected with a public garage could not be maintained in a light commercial district, and as the painting of an automobile was in the nature of repairs to it, such a calling came within the same prohibition. True it may well be argued that the wrecking of an automobile is not the repair thereof, but we must look to the intention which the legislative department of the government had in mind when it enacted its Zoning Ordinance. By specific enactment it prohibited automobile repair shops, and we must therefore ascertain the reason for this prohibition. It may have been that the repair of automobiles necessitated in many cases dismantling and rebuilding of the particular automobile,carrying with the operation, the noise, the dirt, the discarding of damaged parts, all of which might be offensive to such other callings as were permitted in the Commercial Zone. All of these objections are present in the wrecking of a machine, and perhaps even to a greater degree, for in the repair of a machine it is removed from the premises when the repairs are completed, and the discarded parts naturally disposed of promptly, while in the wrecking of the machine the various parts, many of them often damaged are kept until they can be disposed of, therefore I am of the opinion that the wrecking of an automobile is so similar in operation to the repair of one, that it should come within the same prohibition as far as Zoning Ordinances are concerned.

Furthermore, an inspection of Section 5 of the Zoning Ordinance shows conclusively that it was the intention of those who enacted the ordinance that all callings similar to the wrecking of automobiles were to be prohibited within a Commercial Zone, and I feel that the language of the section is broad enough to include this particular calling. You are advised accordingly.

Respectfully,

City Attorney.

To the-
CITY PLANNING COMMISSION.

November 4, 1935.

SUBJECT: Sabbatical Leave - School Department.

Dear Sir:

I am in receipt of your request under date of October 25th for an opinion concerning several questions which Mr. Frank Fenton, attorney for the Controller, has raised concerning certain phases of sabbatical leave.

The questions raised are as follows:

1. Are the provisions of Sections 5.722 and 5.723 of the School Code, as well as the provisions of Resolution 2073 (A and B) of the Board of Education, adopted April 24, 1934, valid and constitutional?

2. Is Resolution B-372, adopted October 1, 1935, which permits the first payment of the first half of compensation at the end of the first month of service following the return to duty in the Department, an advance of payment in violation of the school law and also of Sections 85 and 150 of the Charter; or does the teacher have to wait for her compensation until the end of the first year's service rendered after return to service?

Inquiry is also made as to whether the law contemplates that some services resultant from sabbatical leave - such as increased teaching skill and ability - must be rendered and paid for at the end of each of the two years following return to service and not at the beginning or in advance of services to be rendered.

3. (a) What would be the rights, so far as compensation is concerned, of a teacher dying or otherwise terminating her services with the Department, at or prior to the end of the first year's return to service?

(b) Would she be entitled to the second half of the compensation?

(c) Similarly, what would be her status upon termination of her service prior to the end of the second year?

[illegible]

[illegible] Substituted Issue - Common Assessment.

Gentlemen:

[illegible]

The questions raised are as follows:

1. [illegible]

2. [illegible]

[illegible]

OPINION.

In answer to the constitutional questions raised in Question 1:

It is the policy of this office to presume that all statutory enactments are constitutional unless so flagrantly wrong as to be without question unconstitutional.

So far as the Resolution of the Board is concerned which sets up regulations for giving sabbatical leave which is allowed under the School Code section, I find nothing in these regulations contrary to the School Code sections providing for the same.

In answer to Question 2:

I am informed that the money covering payment for services rendered while the teacher is on sabbatical leave is set aside and ear-marked for that purpose during the year the said teacher is away. Therefore, a payment of part of said sum upon the teacher's return to duty cannot be considered an advance payment. In this connection I desire to point out that even if there were a conflict between the School Code and the Charter provisions regarding a strictly school affair, the Courts have unanimously held that the School Code provisions prevail.

The School Code section creating the sabbatical leave states the following in connection with the method of payment:

> "Such compensation as may be granted by the governing board to said employee on leave shall be paid in two equal annual installments during the first two years of service rendered in the employ of said governing board following the return of the employee from said leave of absence."

I fail to see in what manner the Board of Education has not complied with the above stated provision of the School Code. This code section provides only that the compensation be paid in two equal annual installments <u>during</u> the first two years of service rendered after the return of the employee to the service of the employing district. There appears to be nothing requiring an installment to be paid at any particular time during the school year in which it falls due. Under these conditions it must be held that the governing board of the district has the power to determine exactly when these payments should be made, provided that payment is made before the close of the school year in which the installment is due.

In answer to Question 3:

It appaars that the questions raised here are moot or theoretical in that there is no actual case before you in which the particular facts raised are present. Under these conditions no opinion will be rendered on these questions since, when an actual case arises, there may be a court decision determining the point.

Very truly yours,

CITY ATTORNEY.

To -
Hon. Leonard S. Leavy,
Controller.

#3

November 14, 1935.

SUBJECT: In re: Right of Assessor to Salary While Absent from His Office on Account of Illness.

Dear Sir:

I have your request for an opinion that I advise you as to the right of Assessor Russell L. Wolden to draw his salary while absent from his office on account of illness.

The charter provides that the Assessor shall receive a salary of $8000.00 per year.

Mr. Wolden was elected in 1931 for a four year term commencing on the 8th day of January, 1932.

You state that for several months past Mr. Wolden has been confined to his home on account of illness. Also that while at his home he was in constant touch with his office by telephone and had daily conferences with his subordinates relative to office affairs, and that he has personally signed all of the assessment rolls for the current year and performed such other mandatory acts as the charter requires.

OPINION

The charter having provided for the salary of the Assessor, and Mr. Wolden having been elected for a specified term, the salary is an incident to the office and so long as he occupies the office he is entitled to receive the salary provided for by the charter. The general rule on the subject is tersely stated in Cal. Juris, as follows:

> "An officer is entitled to the salary attached to his office even though he is incapacitated from performing the duties thereof."

21 CAL. JURIS. 943.

The text is borne out by the decision of our Supreme Court in CHUBBUCK v. WILSON, 151 Cal. 162, where the Supreme Court said:

> "At common law the salary annexed to a public office is incident to the title to the office and not to its occupation and exercise and it is apparently well

[illegible] 14, 1964.

[illegible]: In the [illegible] of [illegible]
[illegible] Jones [illegible] Office
[illegible] of [illegible].

Dear Sir:

I have your request for an opinion that a [illegible] may be in his sole right of [illegible] [illegible] to [illegible] [illegible] [illegible] [illegible] from the office of [illegible] [illegible].

The charter provides that the [illegible] shall receive a salary of $[illegible] per year.

Mr. [illegible] was elected in [illegible] [illegible] [illegible] on the 7th day of [illegible], 1964.

You state that for several months prior to [illegible] [illegible] [illegible] [illegible]

established that, in the absence of statutory provision, the de jure officer recovering possession of the office has a right of action against the intruder for the damage occasioned him by the intrusion, and that the salary and fees received by the intruder are the measure of his damage."

In the case of JACKSON v. WILDE, 52 Cal. App. 259, the District Court of Appeal, in dealing with the case of a fireman who was absent from his regular duties by reason of injury, said:

> "So long as he continues to fill the office of fireman he is entitled to the full amount of his monthly salary, regardless of any temporary absence from duty, save, of course, in so far as the ordinance in question contemplates that he shall not receive full pay if he be absent from duty without a leave of absence on account of sickness or disability contracted in the line of duty. It is well settled that a person holding a public office has a prima facie right to the salary thereof, although he be physically disabled from performing his duties; and if there be no law or regulation authorizing the discontinuance of the compensation during the disability, the only remedy is his removal. His right to compensation is not by virtue of contract, express or implied, but exists, when it exists at all, as a creature of law and as an incident to the office."

There is nothing in the charter which provides that an elected official should not receive his salary while absent from his office on account of illness, unless it would be found in Section 150, which provides:

> "No officer or employee shall be paid for a greater time than that covered by his actual service",

or in Section 153 which limits leaves of absence to a period of six months. Mr. Wolden has not received or applied for any leave of absence, and it appears from your communication that during all of the time he was physically absent from his office he was in constant touch with its affairs and actually performed all of the mandatory duties which were required of him by law. It cannot be said that he was absent on leave, or that he did not perform the duties of his office.

You are, therefore, advised that in my opinion, even if we should look upon Mr. Wolden's absence from his office as a failure to perform his duties, he is entitled to his salary, for the

reason that the salary is an incident to his office, and on the other hand, as there is nothing in the charter that an officer of the city and county must at all times be physically present in his office, the fact that his mandatory duties were performed by him fills his official obligations so long as he continues to be the legal occupant of the office.

Yours very truly,

CITY ATTORNEY

Controller
City Hall

November 20, 1935

SUBJECT: Contractors must obtain City License prior to Bidding.

Dear Sir:

Your letter of the 14th instant asking to whom the contract for the Reconstruction of the Union Street tracks of the Municipal Railway should be awarded, was duly received.

Shannahan Bros. Inc. were the lowest of seven bidders, their amount being in the sum of $43,242, and the next lower bidder was Theodore Cohn, in the sum of $45,949. Shannahan Bros. hold a license from the State to engage in the general contracting business but at the time of submitting their bid had not obtained a certificate that the concern was registered as a licensed contractor with the Bureau of Licenses of the City and County. Theodore Cohn had both State and Municipal licenses. Your query is, may you award the bid to Shannahan Bros., who after submitting a bid obtained the certificate from the Bureau of Licenses.

OPINION

On May 10, 1934, an opinion was given you concerning the acceptance of a contract of a bidder who did not possess a contractor's license in conformity with the provisions of the Act of 1929 as amended in 1933, relating to the registration and licensing of contractors. In that opinion it appears that the bidder after making his bid obtained a State license to do business as a contractor. You were advised that you could not consider the bid, as the holding of a State contractor's license was a condition precedent to any bidder submitting a bid and the obtaining of a license after the submission of the bid did not cure the defect.

In the instant case, as part of your specifications under the caption of "Invitation for Proposals" and in the publication of Invitation for Proposals for reconstructing the Union Street Tracks, the following provision, among others, appears:

> "The bidder's attention is directed to the provisions of Ordinance No. 9.0924 of the Board of Supervisors, approved August 6, 1935, relative to the registration of contractors with the Bureau of Licenses in the office of the Tax Collector of the City and County of San Francisco."

Section 2 of Ordinance No. 9.0924 provides in part as follows:

> "Every contractor, as the term is defined by this ordinance, shall, before engaging or offering to engage in the construction, etc. (for work to be done for the City) * * * obtain from the Bureau of Licenses in the office of the Tax Collector of the City and County of San Francisco a certificate to the effect that he is registered as a licensed contractor in the said Bureau of Licenses."

Under section 7 of this ordinance, before the Public Utilities Commission may award a contract it is restricted to make an award "only to such contractor or contractors whose name or names appear thereon (list of Register of Contractors) at the time bids are received and who is shown as having complied with the provisions of this ordinance. No award of a contract for any public work or improvement shall be made to any contractor who has not registered as in this ordinance provided."

Section 9 of Ordinance No. 9.0924 declares a failure to register to be a misdemeanor punishable by fine and imprisonment.

The provision of the ordinance appears to be a proper exercise of police power as the act is intended for the protection of the public, and the State Act, which is analogous, requiring contractors to register, has been upheld in cases referred to in

ALVARADO v. DAVIS,
115 Cal. App. (Supp.)782

It is therefore my conclusion that you may not award the bid to Shannahan Bros but you may reject all bids or award the bid to Theodore Cohn, the next lower bidder.

The attention of all bidders was definitely called to the provisions of Ordinance No. 9.0924 as heretofore stated in the Invitation for Proposals contained in the specifications and in the published notice of Invitation for Proposals.

Your attention is directed to the fact that this is a P.W.A. project and before approval of the award may be granted by the P.W.A., the contract and the reasons for refusing to accept the lowest bid will be forwarded to Washington.

In an informal discussion with the local legal representatives of the P.W.A., these attorneys share the view that we entertain, namely, that requiring a contractor to register

Section 2 of Ordinance No. [illegible] provides in part
as follows:

"During emergency, or for such time as it deems it fit, the Commission, which [illegible] shall be the sole judge of the emergency, may [illegible] the [illegible] of the Commission in any [illegible] of the Commission of the city and [illegible] the Commission is the [illegible] as a temporary measure [illegible] the [illegible] of Commerce."

Under section 7 of this ordinance, [illegible] the [illegible] Commission has power to [illegible] or [illegible] [illegible] Commission [illegible] [illegible] [illegible]

as provided under Ordinance No. 9.0924 is not unreasonable and is a proper regulation of work to be performed for the municipality.

Respectfully,

JOHN J. O'TOOLE, City Attorney

By _____

PUBLIC UTILITIES COUNSEL

To the
Manager of Utilities

(2)

November 29, 1935.

SUBJECT: IN RE: Tax Rate to be Charged on Unsecured Personal Property Assessed by the State Board of Equalization.

Dear Sir:

I have your letter reading as follows:

"Appearing on the Operative Roll as assessed by the State Board of Equalization for the fiscal year 1935-1936 is an amount for unsecured tangible personal property. We wish to be advised as to what tax rate this amount will take."

OPINION.

I understand that the question to be determined is -

"Shall the tax on property of the character mentioned in your communication be paid pursuant to the provisions of Section 9A, Article XIII of the Constitution, that is, at the rate levied on real property for the preceding year, or shall it be paid at the rate for the current year?"

Section 9A above mentioned is general in character and provides that the taxes levied upon personal property for any current tax year, where the same is not secured by real estate, shall be based upon the tax rate levied upon real property for the preceding year.

If there were no other enactment on the subject undoubtedly this provision would apply to all unsecured personal property. However, in 1933, Section 14 of Article XIII of the Constitution was amended to provide for the assessment and collection of taxes on property of the character mentioned in your letter. The pertinent portion of the amendment reads as follows:

"The Legislature shall have the power to provide for the assessment, levy and collection of taxes upon all forms of tangible personal property, all notes, debentures, shares of capital stock, bonds, solvent credits, deeds of trust, mortgages and any legal or equitable interest thereon not exempt from taxation under the provisions of this Constitution, in such manner and at such rates as may be provided by law, etc."

At its 1935 session, the Legislature availed itself of the constitutional provision above quoted and, in amending Section 3820 of the Political Code, added the following clause thereto:

> "Provided, however, that the taxes on all property assessed pursuant to the provisions of Section 14, Article XIII of the Constitution of this state may be paid by the person or corporation to whom the property is assessed in the same manner and at the same time as if such property were secured by real property."

The property mentioned in your letter comes within the provisions of Section 14 of Article XIII and the Legislature having acted pursuant to constitutional authority, the enactment takes precedence over the general provision in the Constitution.

You are therefore advised that taxes on the particular character of property which you mention should be collected at the rate for the current year.

Very truly yours,

CITY ATTORNEY

To the Controller.

Copy to -
Tax Collector.
Mr. H. B. Harding,
65 Market Street.

#1

December 4, 1935

SUBJECT: Contractors Doing Work Outside City
Not Required to have City License.

Dear Sir:

Your letter of even date, advising me that G.W. Williams was the lowest of six bidders offering to construct valve houses and wood covering for pipe on trestle for the Bay Crossing Pipe Line No. 2, and copy of letter from Associated General Contractors of America, dated December 3, 1935, were duly received.

In your communication you state G. W. Williams whose place of business is Burlingame, had failed to make application to the Bureau of Licenses and is not registered as a contractor in San Francisco. You have asked may you award this contract to G. W. Williams in view of his failure to register with the Bureau of Licenses.

OPINION

It is to be noted that the work proposed to be done by G. W. Williams will be performed in San Mateo County.

Under the "San Francisco Contractors' Registration Ordinance," Bill No. 754, Ordinance No. 9.0924, it is provided in section 2 thereof, in part, as follows:

> "Every contractor, as the term is defined in this ordinance, shall, before engaging or offering to engage in the construction, reconstruction, alteration, repair, remodeling, improvement, reduction, demolition or change in any building, structure or improvement within the City and County of San Francisco, or in the improvement, paving filling or grading of any street, road, avenue, lane, highway, alley or way within said City and County, or in the improvement, grading or filling in of any lot or parcel of land in said City and County, * * *." must register with the Bureau of Licenses of the City.

I have underscored the important portion of the quoted section, and a fair interpretation in my opinion of the section would mean that contractors who are doing work

within the City and County of San Francisco must be registered as provided in the ordinance referred to before contracts may be awarded them. We need no precedent to interpret this section as the language is clear and unambiguous.

It may have been the intendment of the framers of this ordinance to compel all contractors doing work for the City to register as provided in the ordinance, but they have from the above underscored language so clearly limited the wording of the ordinance as to confine it to work done within the City that there is no escape from the conclusion that this provision fails to reach contractors doing work for the City which work is to be performed outside the territorial limits of the City and County of San Francisco.

You are therefore entitled to award the contract in question to C. W. Williams of Burlingame, or you may, under your Invitation for Proposals, reject all bids.

Your attention is respectfully directed to an opinion given you on November 20, 1935, concerning Shannahan Bros. Inc. who were to perform work for the City within the City and who had failed to register as contractors in San Francisco.

There is nothing inconsistent in the previous opinion and the conclusion reached herein, as Shannahan Bros were to do work within San Francisco and C. W. Williams is to do work for the City which will be performed outside the City limits.

Respectfully submitted,

JOHN J. O'TOOLE, City Attorney

By _____

PUBLIC UTILITIES COUNSEL

To the
Manager of Utilities

(2)

December 9, 1935.

SUBJECT: In re: Definition of the Word "Church" as Used in Gasoline Supply Station Ordinance.

Dear Sir:

I have your letter reading as follows:

"An application has been received by this Department for a permit to conduct an Automobile Supply Station at the S. W. corner of 16th and Guerrero Streets, and within the two hundred (200) foot limit as prescribed by Ordinance No. 2659, reading as follows:

> No permit to conduct, operate or maintain an Automobile Supply Station shall be granted or issued within the boundaries of two hundred (200) feet of any school, church, theatre or hospital; said measurement to be taken from the front entrance of the Automobile Supply Station to the front entrance of the school, church, theatre or hospital.

"There is a three story and basement frame flat building located at 424 Guerrero Street. The ground floor of this building was formerly occupied as Funeral Parlor, and at present is occupied by a Congregation known as the Greek Pentecostal Mission. The ground floor has a seating capacity of about one hundred (100), and the two upper floors are occupied as an Apartment house.

"The Board of Fire Commissioners respectfully request an opinion from you as to whether or not this building could be classified as a church as specified in Section 2 of Ordinance No. 2659 N. S."

OPINION

It is not contended in this opinion that the congregation which meets at the place mentioned in your letter is not a regular religious society, and that as such is entitled to all the privileges to which any other religious society is entitled, no matter where their respective places of worship may be, nor what may be the character of the buildings in which said worship is conducted. Therefore, let it be understood that the only question which is

[illegible] v. [illegible]

[illegible]: In our [illegible] of the case [illegible] "[illegible]" or [illegible] to [illegible] [illegible] [illegible].

[illegible] [illegible]:

I [illegible] [illegible] [illegible] [illegible] [illegible]

"In [illegible] [illegible] [illegible] [illegible]

now determined is whether the particular building in which the Greek Pentecostal Mission is housed comes within the definition of a "church" as contemplated by the Automobile Supply Station Ordinance. If it does, the requested permit cannot be issued.

It appears from your letter that the building was not originally designed for a church, and that at the present time only the ground floor thereof is being used as a place of worship, while the two upper floors of the building are being used and occupied as an apartment house, the conduct of which is entirely separated from the church.

Giving to the word "church" a broad definition, we may say that it is a building or place which is devoted to the worship of God, or for the purpose of carrying on religious exercises. So, insofar as the particular Congregation interested in the instant case is concerned, it may be said that the particular portion of the building in which they assemble for religious worship is "their church".

However, while this may be true, I cannot bring myself to believe that the portion of a building which was not originally erected for the purposes of religious worship, and which today might be used as a church, and tomorrow for any secular calling, comes within the definition of "church" as contemplated by the ordinance.

The Consitution of the State of California (Section 1½, Article XIII), which exempts churches from taxation, while, not defining the term, limits the exemption to those buildings which are devoted exclusively to the purposes of religious worship, and expressly provides that no building so used which may be rented for religious purposes, and rent received by the owner thereof, shall be exempt from taxation. Therefore, insofar as the exemption from taxation is concerned, the property in question is not a "church".

In construing a statute or an ordinance, we give to the words used their ordinary meaning. Ordinarily a church is presumed to be a building used entirely for religious worship or for purposes incident to said worship, and not used for commercial purposes. It is to be noted that the limitations provided in the ordinance under consideration goes to "schools" - "churches" and "Theatres", and not to places where children may be taught, or where religious exercises may be held, or where theatrical performances may take place. The ordinance in question restricting the use of property must be strictly construed, and, therefore, we cannot but give the ordinary meaning to the words used, and to hold that a "church" is a building devoted to religious worship, to the exclusion of commercial purposes.

[illegible]

[illegible]

[illegible]

A like conclusion was reached in the case of STARKE v. PRESQUE ISLE, etc., 139 N. W. 29, where the Supreme Court of Michigan held that a building in the business district which had been previously occupied as a flour and feed store and leased by a religious order did not constitute a "church" within the meaning of an act providing that no license shall be issued to establish a new saloon within four hundred feet of a church.

A like conclusion was reached by the Supreme Court of New Jersey case of GEORGE, et al. v. BOARD OF EXCISE COMMISSION, 63 Atl. 870.

My predecessor, Judge Long, arrived at a similar conclusion as to the use of a portion of the Knights of Pythias Hall by the Second Church of Christ, Scientist. I agree with the conclusion which he reached, which will be found in his opinions, 1912-1916, at page 577.

You are, therefore, advised that in my opinion the occupancy of a portion of the building mentioned in your letter by the religious society referred to, does not constitute that building a "church", and that the granting of a permit for an Automobile Supply Station within the prescribed distance from it, is not forbidden by the ordinance.

Yours very truly,

_____
CITY ATTORNEY

Chief Engineer,
Fire Department,
City Hall.

A like precaution was received by the Sons of [illegible] [illegible], who, like [illegible], [illegible] [illegible] [illegible]

December 18, 1935.

SUBJECT: Phonographic Reporters -
Municipal Court.

Dear Sir:

The payment of salary of one of the phonographic reporters of our Municipal Court having been protested because said reporter does not enjoy a civil service status, said reporter having been appointed pursuant to Section 274c of the Code of Civil Procedure rather than pursuant to the provisions of Section 55 of the Charter of the City and County of San Francisco, the question, therefore, to be answered is:

Does the State law or Charter provisions govern?

OPINION

In 1924 Section 1 of Article VI of the State Constitution was amended by the addition of the following words:

> "Such Municipal Courts as may be established in any city or city and county."

Section 11 of Article VI of the Constitution authorizes the Legislature to make laws for:

> "The manner in which, the time at which, the term for which the judges, clerks and other attaches of municipal courts shall be elected or appointed, the number and qualifications of said judges and of the clerks and other attaches, except as such matters are otherwise provided in this article, shall be prescribed by the legislature. The compensation of the justices or judges of all courts of record, shall be fixed and the payment thereof prescribed by the legislature."

Pursuant to the authority set forth in the Constitution of the State of California, the Legislature in 1925 passed a comprehensive law providing the details for the organization of municipal courts.

As the question here only concerns phonographic reporters, I will confine myself to the statement that the legislature has upon two separate occasions exercised jurisdiction over such reporters.

Section 274c of the Code of Civil Procedure provides in part:

> "Reporters for municipal courts. Each municipal court in this State, a majority of the judges concurring, may, by order entered upon the minutes of the court, appoint as many competent phonographic reporters as the business of the court may require, to be known as official reporters of such court, and to hold office during the pleasure of the judges of such court respectively."

In Section 274d of the Code of Civil Procedure, the legislature recognized the different standing occupied by certain reporters who are now reporters in the Municipal Court by reason of their prior occupancy of the same position in our old Police Court, superseded by the Municipal Court.

It will be noted that Section 274c, Code of Civil Procedure, is absolutely and positively opposed to the application of civil service.

Our Charter provides that the Mayor shall have the power to fill vacancies occurring in Municipal Court judgeships. It has been held that the Governor is the only empowered official to fill such vacancies.

STATS. 1925, p. 648, sec. 17,
WALLACE v. PAYNE, 197 Cal. 539,
HELWIG v. PAYNE, 197 Cal. 524.

While our Charter places the salary of a Municipal Court judge at $6000.00 per annum, the Legislature has fixed said salary at $7500.00 per annum, and it has been held that a city or city and county is bound to pay such salary out of the salary or general fund.

WALLACE v. PAYNE, 197 Cal. 539.

The Constitution authorizing the Legislature to fully legislate as to the affairs of the Municipal Court, the Legislature having provided how phonographic reporters shall be appointed, and Mr. Spalding having been duly and regularly appointed pursuant to the provisions of Section 374c, Code of Civil Procedure, it is my opinion that he is entitled to the sahry of his office, for, in my opinion, the State law and not the Charter provisions apply.

Respectfully,

Controller

CITY ATTORNEY

Section one of the rule of civil procedure provides in part:

> "Jurisdiction and venue of civil actions. Civil actions of which courts of this State, a district court of the United States, or any other federal court has concurrent jurisdiction with the courts of this state, shall be tried in any jurisdiction permitted by the laws of the United States or the laws of this state, or by the laws of the United States and the laws of this state, respectively."

In keeping with the rule of civil procedure, the Kansas lawyer presented the difficult pleading problem of deciding whether his client was an employee in the ordinary sense or whether he was an employee of the United States in the sense of being employed by the federal court.

It will be noted that Section 60-1, dealing with jurisdiction, is mandatory and peremptorily applied to the application of civil service.

The Kansas lawyer realized that the Bureau would have the power to file resolution declaring it to be a federal court employee. It had been held that the Bureau is the only instrument authorized to file such resolution.

> Gunn, 1 Bin. 1, 4 Am. Dec. 57.
> Williams v. Lathrop, 109 U.S. 343.
> Edwards v. Arthur, 147 Ind. 544.

Thus the Kansas lawyer knew the history of a federal court judge by virtue of our system. The legislature has fixed such jurisdiction, or venue, and it has been held that a suit by or for the county is proper if not subject to the rules of the federal court.

> Williams v. Lathrop, 109 U.S. 343.

The constitutional administration has jurisdiction to file suits in the courts of the United States, but a judgment rendered in a state court is conclusive between the parties and cannot be impeached in a collateral action. Suits of legal character are the property of the state and not the federal government.

> Independent.

Footnotes:

December 24, 1935.

SUBJECT: In Re: Appointment of Alien to Position in M. H. de Young Memorial Museum.

Dear Sir:

You have asked me as to the possibility of your employing a person for technical service and investigation in the M. H. deYoung Memorial Museum when said person has made application to become a citizen of the United States but has not received final papers.

OPINION.

Section 8½ of the Constitution of the State of California under which our Charter is framed gives to a municipality the right, among other things, as follows:

> " * * * to provide the manner in which, the method by which, the times at which and the terms for which the several county and municipal employees shall be elected or appointed and for their recall and removal and for their compensation and for the number of deputies, clerks and other employees that each shall have and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees."

It was therefore competent for those who framed our present Charter to provide for the qualifications of all employees of the City and County.

The charter framers exercised this privilege in Section 7 of the Charter which deals with the qualifications of employees insofar as residence and citizenship is concerned. The general provision in the section on citizenship is as follows:

> "All employees of the city and county shall be citizens and shall have been residents thereof for at least one year prior to the appointment unless otherwise specifically provided in this charter."

The exception is found in a proviso in the same section which reads as follows:

"Provided, also, that positions requiring expert or technical training may, on the recommendation of the department head and the mayor and with the approval of the Civil Service Commission and the Board of Supervisors, by exempted from the requirements of this section."

I am therefore of the opinion that if the position which you mention is one requiring expert or technical training the appointment may be made notwithstanding the fact that the appointee is not a citizen of the United States provided the head of the museum and the mayor, with the approval of the Civil Service Commission and the Board of Supervisors, exempt the appointment from the ordinary qualification of citizenship required by Section 7 of the Charter.

You are advised accordingly.

Very truly yours,

CITY ATTORNEY.

To -
Herbert Fleishhacker, Esq.,
President, Park Commission,

December 26, 1935.

SUBJECT: Re: Whether Motorcycles Come Within the Provisions of Ordinance No. 4412 (New Series) Regulating the Construction and Use of Buildings Used as Automobile Repair Shops.

Dear Sir:

I have your request for an opinion as to the applicability of Ordinance No. 4412 (New Series) regulating the construction and use of buildings used as automobile repair shops, insofar as it may pertain to premises which are to be used exclusively for the repair of motorcycles.

OPINION

It must be conceded at the outset that regulations regarding the use of premises for a certain specified purpose (coming within the provisions of the building laws) are to be strictly construed. Therefore, unless motorcycles come within the provisions of Ordinance No. 4412 (New Series), insofar as it provides for "automobile repair shops", the ordinance will not have the effect of limiting the use of buildings for the repair of motorcycles.

Section 1 of Ordinance No. 4412 (N. S.), which gives the "Definitions", reads as follows:

> "(a) An 'automobile repair shop', is a building where one or more automobiles of any make, size or description * * *."

Sections 2 and 3 of Ordinance 4412 (New Series) provide for the place where and the manner in which an "automobile repair shop" may be maintained. There is nothing in this ordinance relating directly to motorcycles.

It is, therefore, necessary to consider whether the term "automobile" is so inclusive as to bring a motorcycle within its meaning.

Webster defines a "motorcycle" as a "bicycle having a motor attached so as to be self-propelled".

Division I, Chapter I, of the Motor Vehicle Act, under Section 35, defines a motorcycle as follows:

> "'Motorcycle'. A Motorcycle is a motor vehicle, other than a tractor, designed to travel on not more than three wheels in contact with the ground."

[illegible]

[illegible] Sec. [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

There have been occasions where the courts have had this problem before them, i. e., the distinction between automobiles and motorcycles. The substance of the definition is to the effect that the word "automobile" indicates a motor driven vehicle mounted on four wheels and a "motorcycle" indicates a motor vehicle mounted on two wheels; an "automobile" being defined as a self-propelled wheeled vehicle,and a "motorcycle" as a bicycle having a motor attached so as to be self-propelled. Therefore, under the definition of "automobile" it has been held that a "motorcycle" is not included.

See: NEIGHBORS v. LIFE & CASUALTY INS. CO. OF TENNESSEE, 31 S. W. (2d) 418, 182 Ark. 356;

MOORE v. LIFE & CASUALTY INS. CO., 40 S. W. (2d) 403, 405, 162 Tenn. 682;

DEARDORFF v. CONTINENTAL LIFE INS. CO., St. Louis Mo., 151 A. 814, 301 Pa. 179;

COLYER v. NORTH AMERICAN ACC. INS. CO., 230 N. Y. S. 473, 477, 132 Misc. 701;

LANDWEHR v. CONTINENTAL LIFE INS. CO., 150 A. 732, 735, 159 Md. 207, 70 A. L. R. 1249.

In line with the above, you are advised that Ordinance No. 4412 (New Series) is not applicable to motorcycles or a repair shop to be used exclusively for the repair of motorcycles.

Respectfully,

Supervisor Arthur M. Brown, Board of Supervisors, City Hall.

CITY ATTORNEY

December 27, 1935.

SUBJECT: Funds on Deposit with Retirement Board not Subject to Assignment. (Spring Matter).

Gentlemen:

I have for an opinion the legality of an assignment, made by one Harry J. Spring, of "one-half of all right, title and interest in and to all moneys, funds, credits, rights and claims now existing or hereafter accruing" to the assignor, in your possession. This assignment formed part of a property settlement agreement entered into between the aforesaid assignor and his wife, Mary Frances Spring, dated June 26, 1935, and became one of the provisions in a decree For Permanent Support and Maintenance, between the indicated parties, signed June 27, 1935 and recorded July 1, 1935.

OPINION

By virtue of Section 158, present charter, the Board of Supervisors, on December 29, 1932, finally passed Ordinance No. 9134 (New Series), which is the administrative instrument for your body and the same is now in effect.

Under the terms of Section 18, of said ordinance, an assignment of funds on deposit is expressly prohibited and, by inference, the same restraint obtains as to future contributions, by virtue of this language:

> "The right of a person to a pension, an annuity or a retirement allowance, to the return of contributions, the pension, annuity or retirement allowance itself, any optional benefit, any other right or benefit accrued or accruing to any person under the provisions of this ordinance and the moneys in the fund created under this ordinance shall not be subject to execution, garnishment, attachment, or any other process whatsoever, and shall be unassignable except as in this ordinance specifically provided."

In view of the foregoing, the assignment entered into between the aforesaid persons does not effectuate a change in the funds as held by you for the account of said contributor, and you are so advised.

Respectfully,

CITY ATTORNEY

Retirement Board
City Hall.

[illegible]

[illegible]

[illegible]

December 27,1935.

SUBJECT: Where,at the Time of Injury to Fireman, no Provision of Law Continues Benefit to Widow in the Event of Death, Such Person is not Entitled to Benefit on Death of Injured Fireman.

Gentlemen:

Some time ago by letter you requested my opinion whether one Marion C. Jordan, a widow of a retired fireman, is entitled to monthly payments from your system for her life, or until her remarriage, of an amount equal to the monthly retirement allowance which her husband, Frank Jordan, received prior to his death.

The history of the matter and the basis for application of our opinion is as follows:

> "Frank Jordan, fireman in the San Francisco Fire Department, was retired because of disability, on February 1,1914, under the provisions of Section 4, Chapter VII of Article IX of the Charter. At that time he was married to Anita Jordan, the marriage having taken place in 1897. The Retirement Law, did not then provide for the continuation of the retirement allowance to the widow after the death of the retired fireman.
>
> On January 29,1921 Anita L. Jordan died. On July 7, 1923 Frank Jordan married again, the name of his wife being Marion C. Jordan, who is the same individual who is now applying for a retirement allowance.
>
> At the time of this marriage, on July 7,1923, the Retirement Law was exactly the same as at the time Frank Jordan retired, that is, it did not provide for the continuation to a widow, of the retirement allowance which her husband drew as a retired fireman. At the general election in 1924, however, section 4, referred to above, was amended to provide that the retirement allowance of the retired fireman should continue after his death, to his widow, regardless of the date of marriage. This amendment became effective in January,1925.
>
> The provisions of the Retirement Law under which retirement allowances were continued to widows, remained unchanged until January 8,1932, when the so-called "new Charter" became effective. Subdivision (a) section 169 of this Charter, provides that the retirement allowance shall be continued to the surviving widow only if she was married to the deceased, retired fireman at least one year prior to the date of his retirement. This provision is now and has been continuously in effect since January 8,1932"

OPINION

Under the decision in the case of Mary O'Dea v. Jesse B. Cook,et al., reported in Volume 176 Cal.p.659, the petition of the widow herein for a continuation of the pension to her must be denied.

The doctrine announced in the aforesaid matter was to the point that the provisions of the Charter in effect at the time of the happening of the contingency upon which the pension is provided is the measure of the benefit to be enjoyed. The law operating when the pensioner was injured did not under any circumstances continue the benefit to the widow, and, because of this,I can see no authority for your continuing the pension to the petitioner herein.

Respectfully,

City Attorney.

RETIREMENT BOARD.